MODERN REPORTS:

OR,

SELECT CASES

ADJUDGED IN

THE COURTS

OF

KING'S BENCH, CHANCERY, COMMON PLEAS, AND EXCHEQUER.

VOLUME THE THIRD;

CONTAINING,

A Collection of several Special Cases adjudged in the Court of King's Bench in the last Years of the Reign of Charles the Second; in the Reign of King James the Second; and in the first and second Years of King William and Queen Mary: Together with the Resolutions and Judgments thereupon.

THE FIFTH EDITION,
CORRECTED:
WITH THE ADDITION OF MARGINAL REFERENCES AND NOTES,

By THOMAS LEACH, Esq.
OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

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1793.

TO THE

PROFESSOR'S

OF THE

COMMON LAW

OF

ENGLAND.

GENTLEMEN,

ALL Human Laws are either *natural* or *civil.*

The *law of nature*, which is alſo the *moral law*, is at all times and in all places the ſame, and ſo will always continue. By *civil laws* I mean, ſuch as are eſtabliſhed by human policy; which, with us, are either cuſtoms or ſtatutes; and theſe have alſo ſome reſemblance to natural laws, becauſe they are for the moſt part introduced by the concurrent reaſon of men; and reaſon is the law of nature. CUSTOMS are made by time and uſage, and do thereby obtain the force of laws in

particular places and nations; but no otherwise than upon supposition that they were reasonable at the beginning. To these may be added such laws as are usually called *responsa prudentum*, which, together with customs, make a great part of our municipal laws. And because it is impossible that future evils should be foreseen by the wisdom of mankind so as to prevent them, therefore it is very reasonable that positive laws should be instituted by the legislative power, which we call STATUTES; and those are either commands or prohibitions, always enacted upon some present emergencies, and may be altered or repealed according as the manners of men change, or as the conjuncture of affairs require for the public good.

I DO not find that this nation was governed by any settled laws from the time of WILLIAM, called *the Conqueror*, till the ninth year of *Henry the Third*, but by the irregular power of the *Norman King*, and of those who immediately succeeded him. It is true, he swore to preserve *approbatas et antiquas leges Angliæ*; but it is as true, that the same force which compelled our forefathers to submit, did likewise exact their obedience to the customs of *Normandy*, some of which we retain to this very day. It was then a term of reproach to be called AN ENGLISHMAN, as if that denomination imported to be *a slave*. This made the lesser barons (that is, the freeholders, or those which had such lordships which are now called *court barons*) take up arms to regain their ancient rights; and by that means they obtained a grant of their old laws from some of those kings, which was called *Magna Charta Libertatum*: but living in a tumultuous age they did never quietly enjoy those liberties; for, notwithstanding that charter, many infringements were made upon them, which they continued

nued in arms to defend; insomuch that, in the seventeenth year of KING JOHN, they delivered to that king a schedule of their ancient customs in writing, desiring that he would establish them by another grant, which was done accordingly. But this charter was as little observed as the former; for the *Norman* customs did still interfere with *St. Edward*'s laws, and the people were miserably divided by those innovations till, in the ninth year of *King Henry the Third*, THE GREAT CHARTER was established by authority of parliament (*a*).

FROM that time those ancient laws and customs were had again in repute; they were revived by that grant, which was only declaratory of them; and because a more exact obedience and conformity might be given to them for the future, therefore did his successor, the good *King Edward the First*, encourage the lawyers in his time to reduce them into order and writing, which was done accordingly about the middle of his reign by *John Breton* (*b*), not the *Bishop of Hereford*, but a Judge of the King's Bench; for, as *Mr. Selden* has observed, the bishop of that name died *anno* 3. *Edw.* I. and in that book which is now called BRETON the statute of *Westminster the Second* is cited, which was made in the thirteenth year of *Edward the First*; and therefore it could not be penned by *the Bishop*, unless he could quote a statute which was not made till above ten years after his death.

(*a*) See the Introduction to an authentic and correct edition of THE GREAT CHARTER and CHARTER OF THE FOREST, with some other auxiliary Charters, Statutes, and corroborating Instruments, carefully printed from the Originals themselves, &c. published by William Blackstone, Esq. at the Clarendon Press, Oxford, 1759.

(*b*) See Mr. Reeves's accurate and elegant History of the English Law, Vol. ii. 281.

This is one of the first fyftems extant of our laws. It is true, the book called THE MIRROR OF JUSTICE was written before, but many additions were made to it in this king's reign by *Andrew Horn*, a learned man in that age.

There was likewife a fmall tract then written by SIR RALPH HENGHAM, *Lord Chief Juftice* of the Common Pleas, which only treats of effoins and defaults in writs of right, writs of affize and dower, and therefore cannot be called a body of our laws.

I must admit that two fuch books were written by the LORD CHIEF JUSTICE GLANVIL and JUSTICE BRACTON, the one in the reign of *Henry the Second*, and the other in the time of *Henry the Third*, but not one more of that nature almoft in the fpace of two hundred years (*a*); for I do not think the book which the *Lord Chancellor* FORTESCUE wrote in the reign of *King Henry the Sixth* can be properly called a fyftem of law. It was publifhed by him for thefe purpofes: firft, to obviate the defign of two great favourites, the

(*a*) "The chief writers upon "the fubject of Englifh law," fays Mr. Reeves, "are *Glanville*, "*Bracton*, *Fleta*, and *Britton*. "But the comparative merit of "thefe four authors appears very "different in the eyes of a modern "reader. The copioufnefs, learn-"ing, and profoundnefs of *Brac-"ton*, place him very high above "the reft. It is to him that we "owe *Fleta* and *Britton*, which "would probably never have "exifted without him. To him "we are indebted for a thorough "difcuffion of the principles and "grounds of our old law, which "had before lain in obfcurity. "But while we give to *Bracton* "the praife that is due to him as "the father of legal learning, we "muft not forget what *Bracton*, "as well as pofterity, owe to "others. *Britton* delivered fome "of this writer's matter in the "proper language of the law, "and *Fleta* illuftrated fome of his "obfcurities; while *Glanville*, "who led the way, is ftill intitled "to the veneration always due to "thofe who firft open the paths "to fcience." Hift. Eng. Law, vol. ii. 283.

Dukes

Dukes of *Exeter* and *Suffolk*, who had uſed ſome endeavours to introduce the Imperial law, and therefore he ſhewed the excellency of the common law above that; and in the next place, it was intended to ſoften the warlike temper of the young *Prince Edward*, by inclining him to the ſtudy of thoſe laws by which he was to govern his people, and to inſtruct him in ſome occurrences therein.

THE Abridgment by *Baron* STATHAM, and THE YEAR BOOKS, are for the moſt part made up with caſes then depending in the ſeveral courts at *Weſtminſter*, and with the opinions and reſolutions of Judges, which I rather call *reſponſa prudentum* than *ſyſtems of law*.

THE next attempt in that kind was made by JUSTICE LITTLETON, in the ſeventh year of *Edward the Fourth*, who hath taught ſucceeding ages with great judgment and learning in his profeſſion; but it is now two hundred and thirty years ſince he wrote, and many alterations have been made in the law ſince his time.

I ONLY mention theſe things to ſhew the neceſſity of new books, and that the old volumes are not ſo uſeful now as formerly, becauſe many of the great titles of which they were compoſed are now quite diſuſed; they are mentioned by my LORD HALE in his Preface to the *Lord Chief Juſtice* ROLL's Abridgment, which I ſhall not repeat; and thoſe very titles make the greateſt part of JUSTICE LITTLETON's Tenures.

But amongst all the old tenures and customs, I admire that that of *Borough-English* should still remain amongst us. It is a custom contrary to the positive laws of God, and which inverts the very order of nature. It was introduced amongst us in a barbarous age, and by a very wicked and adulterous practice, after this manner, *viz.* the lords of certain lands which were held of them in *villenage* did usually lie with their tenants wives the first night after marriage. This usage was continued after those very lands were purchased by freemen, who in time obtained this custom on purpose that their eldest sons (who might be their lords' bastards) should be incapable to inherit their estates (*a*). I could never yet find any tolerable reason for the support or continuance of this custom; but the reason of it, which was given by a learned lawyer, is, because the youngest is least able to defend himself: certainly he could never mean ability of body, because it is frequently seen that the youngest son is the champion of the family; and if he intended ability in estate, I would fain know what the elder brother hath to defend

(*a*) "I cannot learn," says Sir William Blackstone, "that this 'custom ever prevailed in *England*, though it certainly did in '*Scotland* (under the name of '*mercheta* or *marcheta*) till abolished by *Malcolm the Third*." 2. Bl. Com. 84.—See also [illegible] bk. 7 and Robinson on Gavelkind, Appendix, who says, that this right is now commuted for a fine paid in many manors, and particularly in the Northern counties, who drew this barbarous usage from their neighbours the *Scots*, among whom, by a law of their king *Evenus the Third*, "Rex, *ante nuptias, sponsarum* "*nobilium, nobiles plebeiarum prae-* "*libarent pudicitiam.*" He adds, however, that it will be found, that the custom of *Borough English* does not particularly obtain in those manors where such fine is paid.

himself,

himself, when, by this unnatural custom, the youngest is entitled to the whole (*b*).

I am not setting up for a reformer of the law, or the abuses of it; it is not a work for a single person, but rather for a committee of able and skilful men of that profession appointed by the Government. Neither will I object against the practice of it, as heretofore, in the year 1654, it hath been done, *viz.* that great part consists in known and apparent untruths; that *a common recovery* ought not to be suffered in a Christian nation, because it is *fictio juris*, which is an abuse of the law; that when it is suffered at the bar by the tenant and demandant, there is scarce a true word in all the *collo-*

See *Lord Bacon*'s Proposal for Amending the Laws of England, Bac. Law Tracts, 1 to 20.

(*b*) The reason of this custom," says Mr. Bacon, "seems to be, "that in these boroughs people "chiefly maintained and supported "themselves by *trade* and industry; "and the elder children, being "provided for out of their father's "goods, and introduced into trade "in his life-time, were able to "subsist of themselves without any "*land* provision, and therefore "the *lands* descended to the "youngest son, he being in most "danger of being left destitute." 1. Bac. Abr. 328.; and Littleton gives this reason, "Because the "youngest son, by reason of his "tender age, is not so capable as "the rest of his brethren to keep "himself." Litt. Ten. 211. Sir William Blackstone, however, conceives, that a more rational account of the origin of this custom may be deduced from the practice of the *Tartars* among whom, according to *Father Duhalde*, this custom of descent to the youngest son also prevails. That nation is composed totally of shepherds and herdsmen; and the elder sons, as soon as they are capable of leading a pastoral life, migrate from their father with a certain allotment of cattle, and go to seek a new habitation: the youngest son therefore, who continues latest with his father, is naturally the heir of his house, the rest being already provided for; and, citing this passage from Walsingham, "*Pater cunctos filios adultos à se* "*pellebat, præter unum quem hæ-* "*redem sui juris relinquebat*;" he concludes, that it was the custom among many other *Northern nations* for all the sons but one to migrate from the father, which one became his heir; and that possibly this custom, wherever it prevails, may be the remnant of that pastoral state of our *British* and *German* ancestors which *Cæsar* and *Tacitus* describe. 2. Bl. Com. 84.—— See also Bacon on Government, 66. Co. Lit. 110. b. Craig Jur. Feud. lib. i. tit. 11. sect. 10.; and the Appendix to 2d edit. of Robinson on Gavelkind.

quium amongst THE SERJEANTS, and that therefore an estate tail may more righteously be discontinued by a feoffment with livery than by the statute *de Donis*.

THIS was the language of those times. They found fault likewise with that wicked process of *latitat*, that it was framed upon a supposed falshood by the suggesting of a *bill of Middlesex* sued out, which is never actually done; and that the defendant could not be taken there, because he is skulking about in another county, which is seldom or never true; and presently afterwards he is *in custodiâ marescalli*, which is as false as the rest; and that *John Doe* and *Richard Roe* are pledges *de prosequendo*, when there are no such men in nature. These things, and many more, I could name, of the like nature, I esteem as trivial matters, for no injury is done to any-body by such formalities. But when there is danger of corruption in that which was originally intended for the great preservative of our liberties, I mean in trials by ordinary juries, it may be worth a great deal of pains and study to propose some effectual means to prevent it, which is the chief end of this Preface, that you may at some time employ your thoughts in so useful a piece of service to your country.

I SHALL only give you a short history of such trials, which is as followeth, *viz.*

THERE are opinions, that such trials were had in this nation by a jury of twelve men long before the time of the *English Saxons*, though the writers in those ages give no account of this matter. This is collected from the great esteem the *Chaldeans* had for the number *twelve*, on account of there being so many signs in the *Zodiack*;

those

those people applying themselves chiefly to the study of astrology; That from them this number came to the *Ægyptians*, and so to *Greece*, where *Mars* himself was tried for a murder by a jury of that number, and acquitted by an equality of votes; which is the first trial mentioned in history by a jury of twelve: That *the Greeks* frequenting this island to export our tin became acquainted with the natives, and in process of time cohabited with them, who, being a more polite people, did introduce this way of trial here; and it is very probable that some of our customs came from them, because some of our law-terms, as "*Chirographer*," "*Prothonotary*," and many more, are derived from their language. After the conquest of *Greece* by the *Romans*, new laws were instituted by them to govern this nation, which was then a province to the conquerors; and though such trials were then disused, yet they had that number in several subordinate forms of their administration. Afterwards, when that great empire declined, when the *Britons* were forsaken by them, and left to the depredations of the *Pagan Saxons*, then were other trials introduced by that barbarous people, which was by *battle* in doubtful cases; and when that could not be joined, then purgations by *ordeal* were allowed; trials very agreeable to the uncultivated temper of those people. Thus it continued till about two hundred years before the *Norman Conquest*; and then *Ethelbert*, an *English-Saxon* king, received Christianity, and by his example the dispositions of the people were qualified into a more civil and peaceable deportment; then were those trials for the most part laid aside, and that good king being at *Wantage* (now a market-town in *Berkshire*), did there, by the advice of his council, ordain, that trials should be had by juries consisting of twelve men; which law doth still continue.

But

But notwithstanding such were then, and are still, the best and most effectual methods to discover the truth, yet *ordeals* were used here for above one hundred and fifty years after the Conquest; and then, about the beginning of the reign of *Henry the Third*, were abolished by act of parliament. But *combats* continued here till the sixth of *Charles the First*; so difficult are the *English* to part with any ancient usage of their ancestors, though in no wise suitable to them, who live in a more polite and learned age.

Juries being thus confined to the number *twelve*, it was afterwards enacted by the statute of 2. *Hen.* 5. st. 2. c. 3. that all jurors returned for trials of issues, &c. should have FORTY SHILLINGS *per annum*. This law continued for the space of an hundred and ninety years, or thereabouts; and then the wisdom of the nation, considering that to be a very mean estate for the support of a juryman, a farther provision was made by the statute 27. *Eliz.* c. 6. that such jurors should have FOUR POUNDS *per annum*. And thus the law stood for above an hundred years, in all which time this kingdom has been growing in riches; its trade is now extended to most parts of the world; and as that has been enlarged, so the price of our lands, the value of our rents, of our natural commodities, and of all our manufactures, have wonderfully increased; so that a man of FOUR POUNDS *per annum* is now in so mean a condition of life, that he is no longer to be entrusted with the trial of an ordinary cause; and therefore by the statute of 4. & 5. *Will. & Mary*, c. 24. s. 15. such jurors are to have TEN POUNDS *per annum*. Now upon a moderate computation of the price of provisions and other

necessaries

necessaries in 2. *Hen.* 5. and how they increased in value from that time till the queen's reign, it may be reasonably affirmed, that FORTY SHILLINGS *per annum* about the time when that king lived, would bear an equal proportion to *forty pounds* a-year in her reign; and if so, it may as reasonably be said, that FOUR POUNDS *per annum* in her days would almost bear the like proportion to EIGHTY POUNDS *per annum* now, because of the vast increase of riches by commerce, and otherwise, in this last age; and such an estate doth now qualify a man to be of the grand jury. The FORTY SHILLINGS *per annum* in *King Henry*'s reign was esteemed a sufficient estate to supply all the common necessities of life, wheat being then sold for twelve pence *per* quarter, and good *Gascoign* wine for forty shillings *per* tun. It was an age when twenty marks *per annum* was a very good allowance to maintain a student at the INNS OF COURT, but too great a charge for a commoner to bear; and therefore the LORD CHANCELLOR FORTESCUE tells us, that none but the sons of noblemen *in hospitiis illis leges addiscebant*.

THE JURORS in those days were all knights, but are now mean and illiterate persons; for it is a very poor estate which qualifies them for that service. How can matters of fact, which often require great examination, be tried by men of such narrow capacities, which are generally found amongst men of ten pounds *per annum*; for so it will be so long as the degrees of fortune make such a vast inequality amongst us. Experience teaches us, that men of such low fortunes, and whose education is generally amongst the beasts of the plough, have not the same sense of

of honour and virtue with men of more elevated qualities and conversation; there must be danger of subornation and perjury among such jurors: and what will the *villenous judgment* in *attaint* signify? I mean in respect to their estates, *viz.* "That "their goods be confiscate, their lands and pos- "sessions seized into the king's hands, their houses "demolished, their woods felled, and their mea- "dows plowed." This is a very dreadful sentence to a man of a good estate, which by the very form of this old judgment every juror was supposed to have; but it is an empty sound to a man of TEN POUNDS *per annum*, who cannot have all those possessions, and but a very small proportion of either (*a*). It may be therefore thought necessary, that a farther provision be made, that none should be impanelled to try such issues but men of FORTY POUNDS *per annum*, or at least such as, like the jurors in attaint, *qui multa majora habent patrimonia* than what will qualify a petty juror at this day (*b*).

GENTLEMEN,

THE following Collection is the product of your labours; it was borrowed from you at THE BAR; and

(*a*) Sir William Blackstone says, it is the better opinion that the *villenous judgment* is, by long disuse, become obsolete, it not having been pronounced for some ages. 4. Bl. Com. 136.——See also 1. Hawk. P. C. *notis*. Stra. 196. Burr. 996. 1027

(*b*) See 3. & 4. Ann. c. [illegible] and 3. Geo. 2. c. 25. 4. Geo. 2. c. 7. 24. Geo. 2. c. 18. for the better regulation of juries.

It is but juſt to reſtore it. I know men have generally very feint inclinations to approve any writings beſide their own, and ſeldom declare in favour of a book till they hear what ſucceſs it has in the world; and even then are biaſſed by the multitude, who very often condemn without reading, or read without underſtanding. I have heard it often objected (though I am ſtill to learn upon what account), that we have too many printed books of the law already, and that it was more certain and intelligible when fewer volumes of it were publiſhed. I muſt confeſs ſome of the late Reports are collected with very little judgment. But ſtill there is a neceſſity of new books, though not of ſuch; for I would fain know how any lawyer can now be able to adviſe his client with the help and direction only of the old books? It is true, we have but few of them, but it is becauſe in former ages all cauſes (where the thing in demand did not exceed *forty ſhillings*) were tried either in *the county court*, in *the hundred court*, or in *the court baron* of the manor. In thoſe days the great courts of record at *Weſtminſter* were not ſo full of ſuitors as now.

When Bracton wrote, the *Juſtices in Eyre* (who had the ſame power with our *Juſtices of Aſſize*) went their circuits but once in ſeven years; and a long time afterwards, even in the reign of *King Henry the Eighth*, the Judges would often riſe from the Bench in Term-time without hearing a motion, or trying of a cauſe: and I think the practice did not much increaſe till this laſt age; for in the tenth year of *Queen Elizabeth* there was but one Serjeant at the

Common

Common Pleas bar for a whole Term together, and that was SERJEANT BENDLOES; and I do not read that he had any business there. Nay, at that time the Court of Chancery had no greater share of practice than the courts of the common law; for in the two-and-twentieth year of *King Henry the Eighth*, SIR THOMAS MOOR, being then Lord Chancellor, did usually read all the bills which were exhibited in that court; but business is now so much increased, that all the Counsel can scarce find time enough to read the briefs of such bills which are filed every Term. But the law hath now its residence in WESTMINSTER-HALL; most causes of value are there determined; and the great number of *country Attornies* in our days, who, according to my LORD COKE's opinion, by daily multiplying suits have so wonderfully increased the business of those courts, that it seems very necessary that the judicial determinations there should, by new books, be transmitted to future ages. And though some Cases in this Collection, which were adjudged in the late reign, may not have the authority of precedents, because they taste a little of the times wherein the *administration of justice* was not so nicely regarded as the dispensation of such things as were then thought *political rights*, yet the reader will find some good arguments of learned men then at the bar who endeavoured to support our sinking laws.

I do acknowledge, that if men were just, honest, and impartial, to themselves and others, there would be no occasion for books of this nature; and because

caufe they are not fo, I will not make an apology for the publifhing of this. I think the book (being done with fo much care) may be of good ufe to the Profeffors of the Law; but fubmit it to your judgments. I confefs, I am led by my profeffion to affairs of this nature, though my circumftances difengage me from the fufpicion of being AN AUTHOR.

Vale.

TABLE



OF THE

NAMES OF THE CASES.

A.

Burdett

 Creſwick

Fitzgerald

F.

G.

H.

I.

J.

Kellow

K.

THE

L.

M.

Marſh

Peak

Savier

T.

The

MICHAELMAS

MICHAELMAS TERM,

The Thirty-Fourth of Charles the Second.

IN

The King's Bench,

Sir Francis Pemberton, *Knt. Chief Justice.*

Sir Thomas Jones, *Knt.*
Sir William Dolben, *Knt.* } *Justices.*
Sir Thomas Raymond, *Knt.*

Sir Robert Sawyer, *Knt. Attorney General.*

Heneage Finch, *Esq. Solicitor General.*

*[1]

Case 1.

* Putt *against* Rawstern.

Michaelmas Term, 33. *Car.* 2. *Roll.*

TRESPASS was formerly brought for taking of goods, &c. and upon *not guilty* pleaded, the defendant had a verdict. The same plaintiff now brought *trover* against the same defendant for those goods. The defendant pleads *in bar* the judgment in the former action of *trespass*; and upon a demurrer,

A judgment in *trespass* is no bar to *trover* for the same goods.

S. C. Raym. 472.
S. C. 2. Mod. 318.
S. C. Pollex. 634.
S. C. Skin. 48. 57.
S. C. 2. Show. 211.

The question was, Whether a judgment in trespass *vi et armis* may be pleaded in bar to an action of *trover* for the same goods?

SAUNDERS, *for the plaintiff*, to prove that it was no bar, cited a case (*a*) to be adjudged in the common pleas in the twentieth year of *King James*, which was an action of *trover* and conversion of one hundred sheep; the defendant pleaded a former judgment in *trespass* brought against him, *quare cepit et abduxit* those sheep, and that the plaintiff in that action recovered two-pence damages, and that both actions were for the same thing; * the plaintiff replied, that the two-pence damages were recovered for the chasing, and not for the value of the cattle; and upon a demurrer had judgment; for the smallness of the damages implies, that it was for the chasing, and it shall therefore be intended that he had his

*[2]

(*a*) Lacon *v.* Barnard, Cro. Car. 35. S. C. Hutton, 81. S. C. Stiles, 201. But see 2. Show. 211. See also Field *v.* Jefferay, 3. Lev. 124. 1. Com. Dig. 112. 4. Bac. Abr. 117.

PUTT *against* RAWSTERN.

cattle again, and that the conversion was afterwards. MY LORD COKE in *Ferrers' Case (a)* tells us, that a recovery by verdict, confession, or upon a demurrer, in a personal action is a good bar to an action of the like nature, and for the same thing; but that must be understood where the same evidence will maintain both
8. Mod. 316. Ld. Ray. 58. 1217. 3. Wms. 499. the actions. *Croke* reports the same case (*b*) to be ended by arbitration; but that it was the opinion of my LORD ANDERSON and GLANVIL *Justice*, that *trover* and *trespass* are actions of different natures, and one may be brought where the other cannot be maintained; as, upon a demand and denial, *trover* will lie, but not *trespass vi et armis*, because the taking was not tortious.
8. Mod. 217. 10. Mod. 17. 285. 11. Mod. 180. 12. Mod. 101. 311. 344. Fitzg. 313. Stra. 60. 128. 576. And therefore it may be well intended, that when the plaintiff brought *trespass* he was mistaken in that action, and being in the wrong, was barred; but that will be no bar where a right action is brought: as if I deliver a bond to another for advice, who refusing to re-deliver it, I bring an action of trespass and am barred either by verdict or demurrer, yet I may bring detinue. *Trespass* and *detinue* are not the same actions, and therefore a judgment in one shall be no bar to the other; but where two actions are brought for one thing to be recovered, in such case a recovery in one shall be a bar to the other.

POLLEXFEN *for the defendant*. There is no substantial difference between *trespass* and *trover*; for the disposing of the goods in the one case is the same with the conversion in the other; the taking *vi et armis*, and likewise the conversion, are both tortious; and therefore either action may be well brought.

But for the reasons given by the plaintiff's counsel, he had judgment by the opinion of PEMBERTON, *Chief Justice*, and the other two Judges, JONES and RAYMOND; of which DOLBEN, *Justice*, did very much doubt (*c*).

(*a*) 6. Co. 7. Co. Ent. 39. Cro. Jac. 15.

(*b*) Ferrers *v.* Arden, Cro. Eliz. 668.

(*c*) SIR THOMAS RAYMOND says, that judgment was given positively for the plaintiff, by JONES, PEMBERTON, and HIMSELF, DOLBEN *haesitante*, because *trover* and *trespass* are sometimes actions of a different nature; for *trover* will sometimes lie where trespass *vi et armis* will not lie; as if a man hath my goods by my delivery to keep for me, and I afterwards demand them, and he refuses to deliver them, *trover* lies, but not *trespass*, because no *tortious taking*; and that the rule as to this purpose is, that wheresoever the *same evidence* will maintain both the actions, there the recovery or judgment in one may be pleaded in bar of the other, otherwise not; and that it was to be presumed, that the plaintiff had mistaken his first action, and brought trespass *vi et armis* when he had no evidence to prove a *wrongful taking*, but only a *demand* and *denial*. S. C. Ray. 472. S. C. Skin. 58. S. C. Show. 211. And S. C. 2. Mod. 319. agrees, that the Court were of opinion, that *trover* lies where *trespass* does not; that if the plaintiff mistake his action, it shall be no bar to him; that wherever the property is determined by the action of trespass, it is a good plea in bar to trover; and the report adds, *that so it was adjudged here*. But in 2. Bl Rep. 779, it is said, that this report in *Second Modern* is apparently wrong. S. C. POLLEXFEN, 64, says, a writ of error was intended; and in the case of Lechmere *v.* Toplady he is made to say, that he remembered a writ of error was brought, and the judgment questioned. 1. Show. 146. Letchmere *v.* Toplady, 2. Vent. 169. Stiles *v.* Baxter, 2. Brownl. 49.; Gardner *v.* Helvis, 3. Lev. 248.; Hitchin *v.* Bassett, 2. Black. Rep. 779. 831. S. C. 3. Wil. 304. Lamine *v.* Dorrel, 2. Ld. Ray. 1217.

The King *against* Sir Robert Atkins, Knight of THE BATH, and Others.

Case 2.

AN INDICTMENT was found at the quarter-sessions held for the county of the city of *Bristol*, the fourth of *October*, 33. *Car*. 2. against *Sir Robert Atkins* Knight of the Bath, and recorder, and senior alderman of the said city, *Sir John Knight* alderman, *John Lawford* alderman, and *Joseph Creswick* alderman, setting forth,

FIRST, That *King Henry the Seventh*, by his charter dated 17. *December*, in the fifteenth year of his reign, granted to the mayor and commonalty of the town of *Bristol* (the now city of *Bristol* being then a town) and to their successors, that if any shall procure, abet, or maintain any debate and discord upon the election of THE MAYOR, or other minister, he shall be punished instantly by the mayor and two aldermen, to be chosen and named by THE MAYOR, after the quantity and quality of his offence, according to the laws and custom of the realm.

SECONDLY, That according to the privileges granted by *Queen Elizabeth* to the mayor and commonalty of the said city, and their successors, by charter dated 28 *June*, in the twenty-third year of her reign (after which time, as the indictment sets forth, the said town was made a city), there have been, or ought to have been, from the time of the making the said charter, twelve aldermen, whereof the recorder was to be, and now is, one.

THIRDLY, That according to the privileges so as aforesaid granted, by all the time aforesaid (which is from the time of the charter), after the death of every alderman, the mayor and the rest of the surviving aldermen, *et eorum major pars ad summonitionem* of the said mayor being called together, have accustomed to choose another person of the circumspect citizens to be an alderman in the place of him so deceased; and the mayor and aldermen (by the same privileges so granted) have been, and ought to be, justices of the peace for the said city.

FOURTHLY, That continually after the time of the said charter of *Queen Elizabeth*, the recorder and the rest of the aldermen were and ought to be of the privy council (*de privato concilio*) of the mayor, in particular cases concerning the government of the city, whensoever the mayor shall call them together.

FIFTHLY, And such privy council, by all the time aforesaid, (which still is from the said charter of *Queen Elizabeth*) have not * accustomed, nor ought not to be called together to transact any business belonging to that council, unless by *the summons* and in *the presence* of the mayor.

*[4]

SIXTHLY, That after the death of one *Sir John Lloyd*, being at his death an alderman of the said city, the said *Sir Robert Atkins*, then being recorder, *Sir John Knight*, *John Lawford*, *esq.*

If a corporation consist of a *mayor* and twelve *aldermen*, whereof the *recorder* is to be one, and the charter appoint, that after the death of every alderman *the mayor* and the surviving *aldermen*, and the *major part* of them, being called together in council, by *summons* of the mayor, shall elect a person to fill the vacancy; *Quære*, Whether, on the neglect or refusal of the mayor to summon a council for such election, the *recorder* and the *major part* of the surviving *aldermen* can, on notice to the mayor and aldermen, proceed to such election in *the absence* of the mayor?

S. C. 2. Show. 236.
S. C. Trem. 230.
1. Hawk. P. C. 296.

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esq. and *Joseph Creswick*, being all aldermen then of the city, and free burgesses of the city, to make debate and discord upon the election of an alderman in the place of the alderman so dead, on the eighth day of *March*, in the thirty-third year of *Charles the Second*, in the parish and ward of *St. Andrew*, within the said city, did conspire to hold a privy council of the aldermen of the said city, and therein to choose an alderman *sine summonitione, et in absentiâ, et contra voluntatem* RICHARDI HART *militis*, then being mayor of the city. And in pursuance of their said wicked conspiracy, the day and year aforesaid, entered by force and arms into THE TOLZEY, and in the chamber of the council of the mayor and commonalty of the said city, commonly called THE COUNCIL HOUSE, and there riotously, &c. did assemble; and the same day and year they the said four aldermen, *unà cum aliis aldermannis* (which must be two more aldermen at the least, which makes six, and there were but five more in all then in being, taking the mayor in), the said rest of the aldermen not knowing their purposes, held a privy council of aldermen, and then and there, as much as in them lay, chose *Thomas Day* for an alderman in the place of *Sir John Lloyd*, *sine aliqua summonitione per prædictum* RICHARDUM HART then mayor, to meet, and in his absence, and against his will.

11. Mod. 100. 115. Ld. Ray. 565. 1210.

SEVENTHLY, That they farther caused to be entered, in the common council book, the said election, as an order of the privy council; in which book the acts of the mayor and aldermen in their privy council are commonly written; from whence great discord hath risen, &c.

THIS INDICTMENT was tried at the assizes at *Bristol*, by *nisi prius*, and the defendants found guilty.

And thereupon SIR ROBERT ATKINS, one of the defendants (having then lately, before this case, been one of the Judges of the common pleas, but then discharged of his place after eight years sitting there secure) came into the court of king's bench, and in arrest of judgment argued his own case, not as counsel, nor at the bar, but in the court in his cloak, having a chair set for him by the order of the LORD CHIEF JUSTICE, and said as follows:

*[5]

A charter of incorporation directing that the mayor should punish discord amongst the members, does not take away the common law proceeding by indictment.

* FIRST, The indictment mentions the letters patents of *King Henry the Seventh*, made to the mayor and commonalty of *Bristol*, that the mayor with two aldermen (such as he should choose) should by their discretions, according to law, punish such as should make debate and discord at the elections of officers. They have not pursued this course against us, but gone the ordinary way of *indictment*; and therefore I shall not need to speak to it.

If a charter direct the mode in which the aldermen shall be elected, the charter must be recited in an indictment for electing an alderman contrary to the mode prescribed.—Dougl. 534.

SECONDLY, The indictment proceeds to mention letters patents of *Queen Elizabeth*, granted to the mayor and commonalty in

in the twenty-third year of her reign, which provides, that there shall be *twelve aldermen*; and how, upon the death or removal of an alderman, a new one should be chosen, that is, by the mayor and the surviving aldermen, and the greater number of them, being called together (as the indictment suggests) by the summons of the mayor. The whole indictment, and the offence we are charged with, being grounded upon these letters patents, I shall apply myself to speak to it; for our crime is in the undue electing of an alderman, namely, not being summoned together for that purpose by the mayor, and doing it in his absence. I must desire the Court to observe in what manner the mention of these letters patents is introduced The matter and question before us is concerning the election of an alderman for the city of *Bristol*, which concerns the very being, and succession, and continuance of the corporation; nothing can more nearly concern it.

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The defects I observe in the frame of this indictment are these:

FIRST, It does not so much as say or alledge, that *Bristol* is *antiqua villa*, or *antiqua civitas*, or that there was, or yet is, any corporation at all there, nor what it does consist of (if there be any), nor by what name they are called; whether there ought to be a mayor or not; whether their corporation be by charter or prescription; and this Court cannot judicially take notice that there is any corporation there, or what it is, unless it had been shewn. Now if there be no corporation, and no mayor of right, then our meeting to choose an alderman without his summons, and in his absence, is no undue nor irregular proceeding: it cannot appear to the Court, whether the mayor's summons and presence at the election be necessary or not. * Now in all legal proceedings that any way concern A CORPORATION, it is constantly averred and alledged that there is a corporation, and what it is, and how erected; and the least that can be in any case is to say that it is *antiqua villa*, or *antiqua civitas*, where the corporation extends to a town or city which make any prescription, or set forth any custom. Thus we find it in the case of the *City of York (a)*. In the case of a custom of "foreign bought and foreign sold," they prescribe in being a corporation (*b*). In *James Baggs' Case (c)*, a case of a writ of restitution, to restore a capital burgess to his place and office of a capital burgess in *Plymouth*, the writ was directed "To the mayor and commonalty of "*Plymouth*;" the very words of the writ suppose a corporation, and shew what their name is. The return thereupon by the mayor and commonalty is, That *Queen Elizabeth* granted to the mayor and commonalty, that the mayor and recorder should be justices of the peace; and that *James Baggs* was a capital burgess, and did misdemean himself towards the mayor; and thereupon he was dis-franchised. In the printed margin of that case (which I suppose is my *Lord Coke's* own opinion) it is said, That in their re-

An indictment for conspiring to elect an alderman contrary to charter, must alledge that the place is a corporation by grant or prescription, or shew it to be an *ancient town* or *ancient city*.

*[6]

See Rex *v.* Varlo, Cowp. 250. Prec. Ch. 128. 10. Mod. 147. 12. Mod. 126. 559. Ld. Ray. 558. 3. Wms. 143. 310. 423. Stra. 614. 787.

(*a*) Dyer, 279. pl. 10.
(*b*) See also Harris's Case, Latch. 229.
(*c*) 11. Co. 94.

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turn they first ought to prescribe, that there hath been a corporation of a mayor and commonalty time out of the memory of man; and not to begin with the mention of a grant made to a corporation (*a*), as the indictment does in our case; and not shew the original and erection of it, either by prescription or charter. And MR. TROTMAN, a learned man, in his abridging of *James Baggs' Case*, bids his reader observe this marginal note, Yet in that case the return was but in answer to the writ of restitution, which writ itself admitted there was a corporation, and directs the writ to them by name; yet by the opinion there, it was a defect in the return not to shew that they were by prescription. And if it be necessary upon a return of a writ of restitution, to set forth how they came to be incorporated, to which return there can be no traverse taken, nor no pleading to it, as has been held by some; how much more in such a case as ours of an indictment, which must be traversed and pleaded to, and therefore ought to be more exact. That was in a case of removing of a chief member (a capital burgess of a corporation); ours is in a case of the choosing in of a chief member (an alderman) into a corporation; so that ours is much resembling that case in that respect.

Ld. Ray. 1267. 1283.

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An indictment against a recorder and aldermen for electing an alderman contrary to the charter of the corporation, must positively aver, that the charter was granted, and that the mode of election is as the charter describes it, and not merely recite, that *secundum privilegia concessa per literas patentes &c.* the mode of election *ought to be* as therein described.

8. Mod. 58. 296. 328. 330. I. 123. 56. 122. 263.

3 Peer. Wms. 433. 439.

1. Stra. 2. 62

2. Stra. 999. 1246.

* SECONDLY, Another thing wherein the indictment is faulty is this, *viz.* In the manner of introducing the mention of these letters patents of *Queen Elizabeth*, upon which the indictment is grounded, and upon the construction of which the case depends. The indictment does not say positively and directly, that *Queen Elizabeth* made or granted any letters patents to the mayor and commonalty of *Bristol* that there should be twelve aldermen, and for the appointing how they should be chosen (upon which our case arises); nor does it so much as say "*continetur*," which would not have been enough neither, but it introduces the mention of those letters patents no otherwise than by these words, *viz.* "*secundum privilegia concessa per literas patentes, &c.* there were "or ought to be twelve aldermen; *et secundum eadem privilegia* "*sic ut præfertur concessa per totum tempus prædictum* after the "death of an alderman, the mayor and the surviving aldermen "*et eorum major pars ad summonitionem ejusdem majoris convocati* "*eligerunt et eligere consueverunt, &c.*" Now this is no positive and direct shewing that there ought to be any aldermen, nor how they should be chosen; but it is no more than the opinion and conceit of the jury that found the indictment upon their perusal of the letters patents, which were produced in evidence to them; the jury take it by way of collection out of a record, of which they are no proper judges. And this being in *an indictment*, which is the *king's declaration*, and ought to be very exact and certain, and which is in a criminal proceeding to which the parties must plead, and if convict are liable to fine and imprisonment, the law is more curious in this, than where parties do agree *civiliter*. That all criminal proceedings must be very exact

(*a*) Hob. 21. Joy, 54. 2. Brownl. 291. Latch. 229. Dyer, 279. 1. Bac. Abr. 504.

and

and certain, is proved by this, *viz.* None of the *statutes of Jeofails* would ever help them, but by express words except and exclude them from the benefit of them *(a)*. It is said in *Long's Case (b)*, that if in declarations between party and party for lands or goods there must be a great certainty expressed, *à fortiori*, says that case, must it be so in indictments, which are the king's counts or declarations to which the party shall answer; they ought to be full, and not taken by intendment, or to be by way of argument: so it is held in *Leach's Case (c)*, and in *Sir William Fitzwilliams's Case (d)*. * If it be objected, that the indictment is but the finding of a jury, who are the *lay-gents* (as we call them), and they know not the forms of law, I answer, the fact indeed is found by the jury, but the constant course is to have the jury consent to mend the form, and the king's counsel are advised with in the drawing of it, and after it is found; and sometimes the Judges peruse it. The indictment proceeds on, and says, "that "continually after that time" (which must refer to the date of the letters patents of *Queen Elizabeth*) "the recorder and the rest of the "aldermen were and ought to be *de privato concilio*." (I have been recorder there above these one-and-twenty years, and never knew myself to be a privy councillor till now). But the indictment, unhappily, says, "*de privato concilio majoris*." There the word "MAJORIS," as big as it is, is but *terminus diminuens*, it makes us but privy councillors to the mayor. But this is a mistake too; for the recorder and aldermen are not a privy council to the mayor, but the mayor and they are a council to the city. The like to this too appears in the printed margent of *James Baggs' Case*. The clerk who drew this indictment, or the counsel, whoever it was, thought they could not exalt the *Mayor of Bristol* high enough, unless they made him *a prince*, and furnished him with a privy council, and to fill the kingdom again with a great many *reguli* or petty kings, as it was amongst THE BRITONS before the coming of THE ROMANS. It is part of the misdemeanor charged upon *James Baggs*, that he did ironically say to the *Mayor of Plymouth*, "You are some prince, are you not?" Now to say it to a mayor in good earnest, as this indictment does, I take to be much worse.

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THIRDLY, The indictment, having made the recorder and aldermen to be of *Mr. Mayor's* privy council, goes on, and lays it down for law or usage, "That by all the time aforesaid" (which is still from the date of the patent of *Queen Elizabeth*) "such privy council have not accustomed, nor ought not to be "called together, to transact any business that belongs to the "council" (we must suppose the choosing an alderman is such business), "unless by the summons, and in the presence of, THE "MAYOR." But upon what ground does the indictment lay this

(a) Post. 167. Cro. Car. 144. 312. Jones, 320. 8. Mod. 58. Fitzg. 56. 1. Bac. Abr. 96.; and Barrington on the Statutes, 201.

(b) 5. Co. 120 121.

(c) Cro. Jac. 167.

(d) Cro. Jac. 19, 20.

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down for a rule? Is it because the letters patents so direct? If so, I * agree it is a clear case; for the letters patents that create a corporation may mould and frame, and form its own creature as it pleases. But then the indictment ought to have alledged it positively, that the letters patents do so provide, which it does not; but the indictment speaks it by a kind of implication and uncertainty, but not positively, nor directly. It says, that "continually "after the time of the charter they have not accustomed to meet "without the mayor's summons, and in his presence." It may be they rely upon the usage and custom for it *(a)*. This can be no legal custom nor prescription, for we know the head and original of it, which is but from the twenty-third year of *Queen Elizabeth*; so that it is not like the river *Nile*. If they say, the usage shall interpret the charter, I answer, usage may expound very ancient charters, where the words are obsolete and obscure, and may bear several senses; but this charter has not so much as ambiguous words, nor any-thing that can bear such a construction *(b)*.

Fitzg. 309. 8. Mod. 292. 10. Mod. 75. 100. 147. 12. Mod. 423 Ld. Ray. 848. 1236. 1. Stra. 53. 314. 2. Stra. 994. 1003.

But at last we shall be told, that the common law does operate with the charter, and requires the mayor's summons and presence to the choice of an alderman, and also in all such-like cases. This is now the only point to be spoken to, and I shall apply myself to it. I think it will be granted, that the mayor has no negative voice in the election of an alderman (as great a prince and as absolute as the indictment will make him); he has but one single voice; and if the majority of the votes be against his vote, the majority must carry it against the mayor. The words of the charter do no more require the mayor's summons and presence than it does that of the senior alderman. The mayor is named in the grant out of necessity, it being part of the name of the corporation to whom the grant must be made. He is named out of conformity too, he many times being none of the aldermen, and therefore could not be included in the naming of aldermen, but must therefore be named by himself. And besides, I agree it is due to him out of reverence. They usually say, he represents the king; but that is but a notion, and a compliment to him; he has no more power than an alderman, who is a justice and a judge of the gaol delivery as well as the mayor. If the charter had intended that there should be no chusing of an alderman but by the summons of the mayor and in his * presence, it would surely have made him of the *quorum*, in that clause which provides for the election of an alderman; but that it does not: the only *quorum* is not of the sort of persons, but of the majority of the electors, *major pars eorum* (having mentioned before the mayor and aldermen). Nay, there is something to be observed out of the charter itself, which proves that the queen intended no such

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10. Mod. 74. 11. Mod. 188. Ld. Ray. 1236.

(*a*) See Rex *v.* Varlo, Cowp 748.; Blankley *v.* Winstanley, 3. Term Rep. 279.; Rex *v.* Bellinger, 4. Term Rep. 813.

(*b*) 4 Term Rep, 608. 821.—See also the case of Hugh Powell *v.* the King, Brown's Cases in Parl. 428.

thing;

thing; and that is, there are other clauses in the same charter to other purposes, that do expresly appoint *quorums*, and the mayor and recorder are made to be of the *quorum*, which proves, that where it is not so expressed, the mayor himself is not of the *quorum*; and this indeed led us to that opinion and construction, that we proceeded to make our election upon it. A charter in one clause of it is best expounded from other clauses in the same charter. In the clause that gives them power of gaol delivery, the mayor and recorder are both of the *quorum*. So in the swearing of a new alderman it is expresly provided, that it shall be done "before the mayor and recorder both." In the clause that gives them power to try felons, and to keep a sessions of the peace, it appears, by the express words, that it may be done in the mayor's absence, and without him; for there the *quorum* for that purpose is, "the mayor and recorder, or one of them." So that a sessions may be held without the mayor; yet I would never do it if I could prevail with the mayor to join with us, as we earnestly endeavoured, time after time, to do in the case before you, for the chusing of an alderman; but he utterly refused us, at four several times, at some good distance of time. If it be said, that the power to elect an alderman is given to the mayor and aldermen, or the major part of them; and so the mayor by himself is particularly and expresly named by the name of his office, and therefore is of the *quorum*, without any other express making of a *quorum*; I answer, This I have already spoken to, *viz.* upon what account he is so named; and it could not be otherwise. But that this does not so make him of the *quorum* in it, is manifest by this, that those other clauses where there are express *quorums* of persons, though the mayor be there likewise mentioned in the beginning of the clauses, yet he is repeated over again, when they come to make him of the *quorum*: this shews the naming him before by his office did not do it; if it * did, the naming of him again in the *quorum* will be a tautology and a vain repetition. * [11]

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But perhaps it will be said, it belongs to the office of a mayor at the common law to summon the corporation (and among the rest the aldermen) when he sees there is occasion, and he must, as mayor, be present among them, or nothing can be done. Let us examine the truth of this. Those that advised the indictment were not of this opinion; and I heard it was said at the trial, that it was drawn with good advice; for the indictment itself challenges this right to the mayor upon another ground. It would intimate as if the words of the charter gave it him, as I have already observed; which says, that "*secundum privilegia concessa* "*est*;" therefore they thought it was not his due at the common law.

FIRST, For his name of *mayor*, that imports no such thing. He is *major*, that is, the greater, the more eminent. This notes his pre-eminence in respect and reverence, but gives him little more of power than what the rest of the aldermen have. The

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like office among the old *Romans* was the *prætor*, which (as MINSHEW says) comes from *præ-itor*, *à præ-eundo*, he does *præire*, or *præcedere*, or *præsidere*. He goes first, and sits uppermost, but it gives him no more power. But the mayor in our case would neither lead nor drive. But if there can be no election of an alderman without his summons and presence, and if he be wilful (as the mayor in our case was), he is not only *major maximus*, but *dominus fac totum* (as the vulgar saying is), or *dominus-faciens totum*. The twelve aldermen without him will be but so many cyphers; the mayor will be the great figure; and the aldermen will signify only in conjunction with him. We may then say of every alderman as the one *Grecian* captain said of the other, of ULYSSES, *Nihil est Diomede remoto*. Mr. Mayor will be that which the logicians call, *Causa sine quâ non quæ per se nihil facit, sed tantum esse aliquid sine quâ reliquæ causæ non faciunt*. So much for his name and title.

SECONDLY, Then for the office itself. That does not require his summons nor presence in all the meetings of the aldermen; for the business of the corporation is not incident nor essential to his office of mayor by the common law. [12] The common law looks upon him as the head or chief of the corporation; but he is no officer of the common law, to whom the common law limits or prescribes any duty, as it does to a Judge, a sheriff, a conservator of the peace, a coroner, or a constable: these are all officers at the common law, and the common law instructs them in their power and duty. But the mayor being the head of a corporation, and a corporation having its essence by charter, or prescription, which pre-supposes a charter, he has no power but what the charter expressly gives him; the common law takes no farther notice of him. Let us examine the ground and nature of A CORPORATION, and there we shall find the true nature and office of a mayor, or any other head (for it is all one). The true ground and original of corporations in cities and great towns, is this: those are generally the staples of trade and merchandize; and trade cannot be maintained without order and government (*a*); and therefore the king, for the public good, may erect *gildam mercatoriam*, a fraternity, or society, or incorporation of merchants, to the end that good order and rule shall be by them observed, for the increase and advancement of trade and merchandizing. Suppose the king should, by his charter, incorporate a town by the name of "mayor and twelve aldermen," and should not set out their duty and office; what power would the law give them in that case? They would have no power as conservators of the peace, or as justices of the peace; they could neither fine or imprison. If they should take upon them to meddle in these matters, without express power given them by the words of the charter, it would be *sutor ultra crepidam*. Therefore charters usually add these powers by express clauses to those purposes, and

2. Burr. 766. Ld. Ray. 1030.

(*a*) See the case of the City of London, 8. Co. 125. a.

make

make the mayor a justice of peace, or a judge of gaol-delivery; but then he acts in those powers not *quatenus major*, nor *eo nomine*, but because of the express power given him, as it might have done to any other man. The uniting the powers in one person, does not confound the several and different capacities of that person. That the charter gives the only rule in these cases, and that a corporation is a mere creature of the charters that does constitute it, and gives it its being; and therefore the bounds and limits of its working appears by this. * Suppose that neither this nor any other charter had given to this corporation of *Bristol* any power to choose a new mayor, or new alderman upon the death of the old, they could then have made no new election; but when the mayor and aldermen had died, the corporation had been dissolved. The charter that gives them their being, must provide for their continuance and succession *(a)*. Thus it is held in the case of the corporation of *Dungannon* in *Ireland*, in those Reports that go by the name of Lord Coke's *(b)*. So that the charter must provide for an election in order to a succession, or otherwise the law will not help them. And though the mayor is the more eminent and excellent, and ought to have greater respect and reverence, yet the subject matter that we are upon is to be considered in the nature of it, *viz.* the election of an alderman. It is not a matter of interest, or of privilege, or of power; for then the mayor ought to be preferred in it; but it is matter of duty and labour, and trust and trouble. It is *officium*, not *dominium*, to choose an alderman. It is rather a burthen than a power or authority; as is said in the *Mayor of Oxford's Case (c)*. But then it will be asked, that if it depend upon *the charter*, and not upon the *common law*, Who shall appoint the time of election, if the charter be silent in it, as here it seems to be? This will be a great defect, and so there will be no meeting, nor no election, and so the corporation will expire (*d*). To this I answer, That the charter does provide for it, for those whose duty it is to make an election, it is their duty to agree to meet for that purpose, and to appoint the time, or else they do not discharge their duty; they break their oath, and are punishable for their omission, and may forfeit their charter by it. Now I do not deny but it is the duty of *the mayor*; and it is the equal duty of *the aldermen*, to see a time be appointed for an election. And as the mayor is the chief in pre-eminence, so it aggravates his neglect if he refuse it: but his neglect of his duty will not excuse the rest of the electors for the not doing of their duty, and the performing of their oaths. If it be said, What if they do

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8. Mod. 129. 358. 10. Mod. 346. 12. Mod. 18, 247. 308. 386. 1. Stra. 625. 2. Stra. 994. 1003.

See Rex *v.* Varlo, Cowp. 250.

(*a*) 1. Roll. Abr. 513. Register, 219. 10. Co. 30. 1. Bac. Abr. 501. 505.—But see Newling *v.* Francis, 3. Term Rep. 189. that when the mode of electing the officers of a corporation is not regulated by charter or prescription, the corporation may make *bye-laws* to regulate the election.

(*b*) 12. Co. 120, 121.

(*c*) Latch. 231.

(*d*) *Vide* Newling *v.* Francis, supra, nota ( ).

not

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not agree upon the time, but are divided? * I anſwer, Whoever can carry an election when they are met and chooſe, ſhall alſo govern in the time of meeting if there be any difference about it; and that is not the mayor, but the *major pars eorum*, &c. (a). Now this agrees with the rule of the law in the like caſes. In a commiſſion of the peace to try felonies, &c. and to hold a court of quarter-ſeſſions, Who ſhall iſſue out the ſummons and appoint

Ld. Ray. 1238. the time? Answer, Thoſe that conſtitute the court, and are to exerciſe the power, muſt iſſue out the ſummons. If twenty juſtices of the peace, not having one of the *quorum* amongſt them, ſhould iſſue out a ſummons for a general quarter-ſeſſions, it would be void; for twenty juſtices of the peace cannot hold ſuch a ſeſſions, if there be not one of the *quorum* among them; nor can the *cuſtos rotulorum* alone do it, though he is commonly moſt eminent. Thus is it in the commiſſion of gaol-delivery, and of *oyer* and *terminer*. We may ſee the forms of them in *Crompton* (b). The expreſs words of their commiſſion, for appointing time and place, are, " *ad certum diem quem vos tres vel duo veſtrum (quorum* " *vos A. B. & C. D. unum eſſe volumus) ad hoc provederitis* (c)." And therefore there was no need of any more expreſs proviſion in the charter for a ſummons for an election of an alderman, or the appointing of a time. In the next place, for the neceſſity of the mayor's being preſent, as well as their meeting by his ſummons, I ſee no reaſon for it. It is true, there is a caſe in print, of *Hicks v. Borough of Launceſton* (d), that ſeems to make for it, though I never yet heard it ſo much as mentioned, either at the trial (for I was not there) or throughout the whole caſe; yet it is fit for me to take notice of it; for I make no doubt but before we have done we ſhall hear of it. Reſolved per Curiam (which were only two Judges, *viz.* the *Chief Juſtice* Richardson, and *Juſtice* Croke, no other of the Judges being there) That if a corporation conſiſt of a mayor and eight aldermen, with a clauſe in the patent, " that if any of the aldermen die, that then the " mayor and the reſt of the aldermen within eight days after ſhall " elect another;" though it be not limited that they or the greater number of them may elect, yet the greater number of them may

*[15] elect (e). * And if the mayor, at the time of the death of an alderman, be abſent at *London* till after the eight days, and the reſt of the aldermen, within eight days, come to the deputy mayor and require him to make an aſſembly of them, to elect another within the eight days, and he refuſe, and upon that the greater number of the aldermen meet without the mayor or his deputy, and elect an alderman, it is a void election; for the mayor ought to be preſent at it, by the words of the grant (f). This

(a) Caſes in Parl. 45. 1. Roll. Abr. 514. 4. Co. 77. 3. Com. Dig. " Franchiſes" (F. 20.).—And ſee Rex v. Monday, Cowp. 538; Rex v. Knight, 4. Term Rep. 430.

(b) Crompton's Juriſdiction of Courts, fo. 121. 125.

(c) 2. Ld. Ray. 1238. Poſt. 152.

(d) 1. Roll. Abr. title, " Corpora- " tion," 513, 514. caſes 5, 6, 7.

(e) 12. Co. 120. 1. Roll. Abr. 513. 3. Bulſt. 71. Salk. 190. 1. Bac. Abr. 505.

(f) 1. Roll. Abr. 515. And ſee 11. Geo. 1. c. 4.

ſeems

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ſeems to be a ſtronger caſe than ours; for there is a certain time limited, by which they muſt make their election, *viz.* eight days. I firſt obſerve, that this caſe, as far as I can find, was not a caſe depending by any ſuit or action; for in that caſe it is ſaid, "a writ was granted to make a new election of an alder-"man." So that I ſuppoſe it was upon *a motion* only: I have a copy of the rules which ſhews it to be ſo, as I take it. Then it does not appear to be upon an argument; for had it been ſo, two Judges, I preſume, would not have determined it, but would have put it off 'till the court had been full, as uſually they do; therefore it was not ſo ſolemn, nor has not ſo great authority. But take it as it is; the time of eight days, by which the election was to be made, being limited, makes the caſe never a whit the ſtronger; for there the Judges declare, that there may be an election after the eight days, and the limiting that time was to quicken them. Then obſerve the ground thoſe two Judges went upon; they do not ſay it ought to be ſo at the common law, as doubtleſs they would, had they thought that the common law would have ruled it; for if the common law ſerve for it, it was idle to reſort to any other ground. But the Judges in the *caſe of Launceſton* ſay, that the mayor muſt be preſent at the election by the words of the grant. So that they went by that rule which I have urged, which is the words of the grant; it is the charter only muſt give the rule, as I have argued all this while. Now what the words of the charter were, does not appear in the report of that caſe. Perhaps there was an expreſs proviſion in the charter requiring the meeting of the aldermen by the ſummons of the mayor, and in his preſence; which if ſo, then there is no diſputing againſt it. * And the drawer of the indictment againſt us has ſo drawn it, as if the charter in our caſe did ſo require it too. But there is nothing to that purpoſe; nay, as I have obſerved, there are concomitant clauſes that give another conſtruction, and argue to the contrary. Therefore the *caſe of Launceſton* differs from our's. But there is another thing wherein that caſe and our's differ. I am no enemy to the government I live under; if any man think otherwiſe of me I care not, becauſe I cannot govern another man's thoughts. I do agree that this ſovereign Court of the King's Bench, as is reſolved in *Baggs' Caſe (a)*, hath a ſuper-intendency and a ſpecial authority in caſes of this nature, which more concern matter of government and the public peace and order than any man's private right or property; and in ſuch caſes this Court governs itſelf much by the circumſtances of the caſe. Now let us mind the circumſtances of the caſe reported by *Serjeant Rolls (b)* and of our caſe, and let them be compared, and there will be a very wide difference between them. And therein I dare appeal to any rational unbiaſſed man in the world for the innocency of our proceedings in the whole matter. The *Mayor of Launceſton* happened to be in *London* at the death of the alderman (to ſupply whoſe place there needed the election).

*[16]

(a) Hughes Ent. 273. 11. Co. 93. (b) 1. Roll. Rep. 173. 224.

He

He was not in the town that was to chuse, whereof he was mayor when the election was made. The aldermen were under an apprehension that they should be guilty of a great omission and neglect of their duty, and perhaps had some thought of their being under an oath too, and that they might be liable to punishment, if they did not chuse within the *eight days* prescribed by their charter; nay, it is likely they thought they could make no choice at all if they did it not within the eight days: though all this was but their mistake of the law, yet it was very pardonable in them. The Judges in their resolution upon that case rectify that mistake, and a new election is thereupon ordered by this Court. The mayor there was not *wilfully* absent, for he was at *London* when the alderman died: he was at a very great distance from his town too, *viz.* about two hundred miles, as I take it; so that he could
*[17] hardly hear of the death of the alderman in * the eight days time, and go down thither before the end of the eight days. There was no great necessity of an election so soon; and the aldermen had done what they did out of a zeal for the public, though it were a zeal without knowledge. But I do not find that the void election, and the aldermen's meeting about it, was held *a riot* or *an unlawful assembly*. No, they were not so much as blamed for what they did; nay, sure they were rather to be commended for their just intentions. But our case was quite another thing; and all our circumstances, and the very plain words of our charter that appoints the manner of our election, we had, to our great charge, and upon good advice, drawn up in a special plea (for the question truly arises upon the words of the charter, and the construction of them). How it happened I cannot tell, but a Judge ruled us to plead *not guilty*; our chargeable *special plea* came in a little too late. It was a matter of record and of law, and fitter to be determined by the Judges than by a jury.

But these in truth were our circumstances, as I shall briefly relate them, and I am ready to make out the truth of them. An alderman of *Bristol*, though chosen, cannot officiate till he is sworn (*a*); he cannot be sworn (by the express words of the charter) but before *the mayor* and *recorder* both. I being the recorder of *Bristol*, happened to be there some time before the day of chusing members to the *Oxford Parliament*, not long after *Sir John Lloyd's* death: I was indeed invited thither. *Sir Richard Hart*, the then mayor, and all of us (I think not one alderman absent) were then met in THE COUNCIL CHAMBER, the usual place for that purpose: we had nothing else to do; and it was moved that we might then make choice of *a new alderman*, while not only *Mr. Mayor* was present, but while the *recorder* was there too: so that the party chosen might instantly have been sworn and entered upon his charge; for they have their distinct wards;

(*a*) See Peter Pindar *v.* the King, 3. Brown's Cases in Parliament, 173. that where a charter directs that the mayor shall continue in office till another be duly elected and sworn, the successor, though duly elected, cannot act till sworn.

and

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and the recorder many times comes not thither in a year or two; for I live forty miles from them, and I seldom tarry above two nights at a gaol delivery; but then (as it fell out) I was there upon another occasion. None opposed it but *Mr. Mayor*, and he did it upon a ceremony and compliment, as he pretended, because *Sir John Lloyd* (as he said) was not yet buried. Out of respect to *Mr. Mayor*, we did forbear.

* Some good time after, and after *Sir John Lloyd* had been buried, I happened unexpectedly to be there again; and *Mr. Mayor* was earnestly pressed again then to go to an election, upon the former reason, that the new alderman might presently be sworn. *Mr. Mayor* still refused; I do not remember but all the rest were very willing to have gone to an election. We did the second time forbear; though I think we were all there: I am sure a great number. I tarried then four or five days; it was at the election to parliament; the poll lasted six days; but I left them at the poll; I was not fond of being chosen. The evening, as I take it, before I went away, we were again upon the place, and the mayor with us, and he was again pressed to it, but wilfully went away; and we still forbore. But that night some of us signed a writing, desiring *Mr. Mayor* to join with us; and we declared in it, that if he did not join, we would proceed without him, being the *major pars*. This shews we had no design to chuse in his absence; nay, it plainly appeared, that the design was on the mayor's part; for he knew I could not stay, and he was desirous to choose in the absence of some of us, that he might carry the election against the person next in course to be chosen, and every way qualified, *viz. Alderman Day*. I consulted the charter, and found it as I have now observed upon it, and was clearly of opinion, for the reasons I have offered, that in such circumstances the *major part* might choose. We gave notice to the mayor and all the aldermen then in town, and though the government is most miserably divided, yet in this business there was nothing of faction, and the different parties were not engaged; only the mayor had his design; for we were six aldermen at the choice. *Sir Robert Cann*, an intimate friend of the mayor's, being lame of the gout, sent us an excuse, but would approve of our choice. Another of our number, one of our six, is a zealous man of *Mr. Mayor's* way; yet, not taking that to be now concerned, joined with us, and voted the same way. We were six; and this appears by the indictment; and we were unanimous in the person we chose. No other person was so much as named, nor, I believe, thought of by any-body, unless by *Mr. Mayor*: there were but four aldermen more in being, for *Mr. Mayor* was none. And the person chosen was not only next in course, but every way qualified; has a great estate (worth three or four of some of the aldermen); no tang of a fanatic, a constant churchman; * he had but one great fault; he gave his vote at the election to parliament for *myself* and *Sir John Knight* against *Mr. Mayor* and *Sir Thomas Earl* (*a*).

*[18]

See the case of Sir Christopher Musgrave *v.* the Mayor of Apelby, 2. Ld Ray. 1358.

*[19]

(*a*) See Rex *v.* Monday, Cowp. 539.

The

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The perſon is not ſworn to this day; nor does deſire the office; but rather declines it: being fit for it, he ſhould have been mayor this year in courſe, but is put by it, and he is contented. There has been another ſince choſen in his place, by the votes of five only (*Sir Richard Hart* the mayor being one). I am ſure they are not *major pars*. And for this choice by ſix, who are juſtices of the peace as well as *Mr. Mayor* and the other four, we, who are four of ſix, are all indicted for *a riot* upon the account of this election. And this indictment is found before *Mr. Mayor* our fellow juſtice, and four more at the moſt; ſo that five, who are the leſſer number, exerciſe their authority over thoſe that were ſix in number when they acted, which ſix were as much juſtices of the peace as they five. It is obſervable, that though we were ſix of us, and all unanimous in our election, yet they have politicly indicted but four of us, and left two out, becauſe it would have been too groſs and palpable, if ſix juſtices of peace ſhould have been indicted before a leſſer number of their brother juſtices. But had they indicted all ſix, it would then plainly have appeared too that the choice had been made by the *greater part*, which they wiſely thought to conceal; but yet it does appear in their very indictment, though darkly couched in it; for it ſays, that we four being recorder and aldermen, *cum aliis aldermannis*, did chooſe the alderman; that word "*aldermannis*," being in the plural number, muſt be two more at leaſt. If it ſhall be adjudged, that we cannot chooſe an alderman but by the mayor's ſummons, and in his preſence, theſe miſchiefs will follow: That he will wholly govern and diſpoſe of elections at his ſingle will and pleaſure; for he that can order the time as he pleaſes, and forbear to ſummon the electors till he ſees his own opportunity and advantage, though often deſired to go on upon it, and refuſes to do it, time after time, till ſuch as will not comply with him be out of the way (as the recorder is very ſeldom there, and tarries but a night or two, and then is in a hurry of buſineſs, and moſt of the aldermen are often at their country-houſes), the mayor will caſt the choice upon whom he thinks fit, as in this caſe he has done. This mayor and [20] * four aldermen have rejected the choice made by ſix, and of the perſon that was next in courſe, and every way qualified; and yet the charter thought not fit to truſt any fewer than the mayor and the whole bench of aldermen in a matter of this importance to the city. If it be ſaid, that in caſe the mayor unreaſonably defer it we may complain to this court, *viz.* THE KING'S BENCH, and have a *mandamus*, or apply ourſelves to the king and council to compel him to proceed to an election: Who will be at ſo great a charge and trouble? And that courſe is not ſo ſpeedy; it may chance to be in *a vacation*: but let it be as ſpeedy as can be, the mayor in the mean time has obtained his ends, and gained his opportunity, and done his work, as the mayor in our caſe did; where the mayor and four more (but five in all), being *minor pars*, have controuled the choice made by the *major pars*. If it ſhall be ſaid, that if the *major pars* be preſent, and join in voting to an election,

See Rex *v.* Mayor and Aldermen of Carliſle, 1. Stra. 385.

election, though they divide in the person, yet the *major part* so met shall make a good election, and in law it shall be the choice of all present. That I must deny, for the words of the charter are, that the *major pars superviventium* shall make the choice; that is, as I understand it, agree in their votes or voices in the party chosen; and so it was in the choice that we six made. This agrees with the rules of the common law, in elections and leases to be made by corporations (*a*). And this agrees with the statute of 33. *Hen.* 8. *cap.* 27. But if this should not be law (as I take it is), yet the subsequent election of an alderman, made by the mayor and four aldermen more, cannot be good; for though the mayor and seven aldermen were present at it, yet three of them did not join in going then to an election; for they had joined with us before in our choice, and therefore opposed any after-election to be made. But they have gotten a conceit among them at *Bristol*, that what is done in a man's presence, where his presence is required by their charter, though he dissent and oppose what is done, is yet legally done. As in the case of the swearing of an alderman, by the express words of the charter it cannot be done but before the mayor and recorder both. This *Sir Richard Hart* was duly chosen an alderman long ago, but not sworn until the last gaol delivery, when * we were going to try the felons. [21] I being present, they thought that sufficient to satisfy the charter, and in a tumultuous manner, with an hideous noise, they cried out to swear him; and this was not the usual place neither for it. I opposed the swearing of him, and I will justify it that he was utterly unfit to be sworn, by something that happened since his being elected an alderman; they would not hear me, but resolved to proceed to swear him, because I was present with the mayor. Thereupon I withdrew, and in my absence they went on to swear him, and he now acts as an alderman, and as a justice of peace, under this colour. If no election of an alderman can be made but in the mayor's presence, it will be in the power of one single person (if he be obstinate and wilful) to forfeit the charter. For if he find the aldermen like to chuse contrary to his mind, he need but withdraw, and all the rest are insignificant persons, and so there shall be no election in any reasonable time, and thereby the liberties forfeited. If this absolute power allowed to mayors may serve a politic turn for once, it may do as much mischief another time; for he may be of a contrary and cross humour to what may be desired. And he is not a person nominated by any superior power to that place, or imposed upon the corporation, but chosen from amongst themselves, and chosen by themselves. But though they chuse him, yet it is not safe to trust all the liberties of the city in the breast of one man; for one man may easily change and be wrought upon, where many cannot. It is better to trust twelve than one. The right of election is a very tender thing; and it is a maxim at the common law,

(*a*) See Dyer, 247. pl. 74. and Sir John Davies' Rep. 47.

 and

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8 Mod. 36. 186. 10. Mod. 48. 175. 181. 11. Mod. 100. 174. Comyns, 86. 240. 1. Stra. 314. 385. 2. Stra. 1051. 1. Ld. Ray. 89.

and strengthened by several acts of parliament, that elections should be free. By the statute of *Westminster the First*, in the time of that wise and excellent king *Edward the First (a)*, it is enacted, "that elections be free." And it forbids, "under a "grievous penalty" (those are the words), that "*nul haut home*," no great man (such as every mayor is in his sphere), shall disturb to make free election. *Sir Edward Coke (b)*, in his exposition of that statute, says, it extends to all sorts of elections, and agrees with the maxim of the common law. Now if the mayor shall at three several times refuse the advice and desire of the aldermen, and, knowing that they can make no choice without him, refuse to join with them till he sees his own time and advantage, he will have his own choice, do what they * can; for before they can complain of him (which is a work of time and charge and trouble) he will have done his work, and so prevent them. And then where is the freedom of election? This could never appear more plainly than in this case of our's, where the election by the majority is set aside, and the choice made by a lesser number, and in effect by *Mr. Mayor* only, is that which carries it. It plainly appears that we had no sinister design to do any-thing without the mayor, for we did all we could to get him to join with us, and he thrice denied us; but it as plainly appears, that the mayor had a design in refusing to do it till some of us must be gone, and then to steal an election behind our backs, by a lesser number, when he had the advantage.

* [22]

After all that I have said I do agree, that had eleven aldermen of us gone about an election without so much as desiring the mayor to join with us, or it may be upon once or twice being refused, or when the mayor had been occasionally absent; or had it any way appeared that we meant a surprise in it; or had we made a choice subject to the least exception, and had he not obstinately gone away from us, being in person upon the place, without so much as giving us the least reason for his refusal, I should have held my tongue, and not have concerned myself any farther in it. I hope it sufficiently appears, that I have been no enemy to government and order. But to choose an alderman was our duty, and we were under an oath to do our duty, and we did but discharge our trust. I may, I think, save myself the labour of arguing, that if we were mistaken in the construction of the charter, and in the point of law in the making of our election, yet here is no *riot* in the case (for we are indicted for *a riot*), for A RIOT is the doing of an unlawful act with force and violence (*c*); neither are we AN UNLAWFUL ASSEMBLY, for that is, where there is an intent to do an unlawful act, but still with force and violence, but they go away without doing it, as appears by *Poulton* (*d*). And in case the election we made be adjudged duly made, then the pretence of a riot vanishes of itself, as is

11. Mod. 100. Finch. 63.

(*a*) 3. *Edw.* 1. c. 5.
(*b*) 2. Inst. 169.
(*c*) 1. Hawk. P. C. ch. 65. f. 1.
(*d*) Pulton de Pace et Regis, pag. 25. 1. Hawk. P. C. ch. 65. f. 9.

held

held in *Eden's Case* (a). If the indictment be void for the principal matter, which in the case there was an unlawful entry against the statute of 8. *Hen.* 6. c. . where that statute was mis-recited; they were not allowed in that case to stand upon the riot.

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* I have but a short word more. I have been the RECORDER of *Bristol* these one-and-twenty years, longer I think than any man can be remembered. I have sworn all the aldermen that are now upon the bench, in my time, and many more who are now dead. I can say it without vanity, till the time of this unhappy election of members to the *Oxford Parliament* (which I sought not) I had the good will of all sides, even of this *Mr. Mayor*, who was *Sir Richard Hart*; for I never would join with any party, but did all I could, when I came amongst them, to join them together and unite them; for ever since they grew rich and full of trade and knighthood, too much sail and too little ballast, they have been miserably divided. And unless this Court, to whom I think it properly belongs upon complaint in such cases, will examine their disorders, and command peace and order to be observed in our proceedings, I cannot safely attend there any more, nor hold any gaol-delivery. * [23]

I submit what I have said to the Court.

Whereupon THE COURT arrested the judgment (b).

(a) Cro. Eliz. 697.

(b) The case was adjourned; and, on being moved again, THE COURT agreed the indictment was bad, for want of a recital of the letters patent, S. C. 2. Show. 238.; and the judgment in the principal case was arrested; S. C. Tremain, 233. But *Sir Robert Atkins*, on the persuasion of his friends, immediately resigned the Recordership.

Lord Grandison *against* Countess of Dover. Case 3.

PROHIBITION.—The case was, *Charles Heveningham* died intestate, leaving an only sister *Abigail*, then an infant. *The Countess of Dover*, who was her great-grandmother, came into the prerogative court, and prayed to be assigned her guardian *ex officio*, which was granted, and thereupon she obtained administration *durante minore ætate*. Afterwards my *Lord Grandison* brought a prohibition, suggesting that the court had granted administration upon a surprise, and being *grandfather* to the children, and so nearer of kindred, prayed that administration might be committed to him. *The Lady* replied, that it was obtained after great deliberation, and without any surprize; and upon this a demurrer.

An administration *durante minore ætate*, granted to the *great-grandmother* of the intestate, ought not to be repealed on the application of the *grandfather*, merely because he is *nearer of kin*; for this kind of administration is not within the statute 21. *Hen.* 8. c. 5. s. 3.—S. C. Skin. 155. 1. Vent. 219. 1. Sid. 281. 1. Brownl. 31. Hob. 249. 12. Mod. 436. 616. Stra. 892. 956. 1. Com. Dig. 262. Fitzg. 163. 202. Andr. 24. 366. 4. Bac. Abr. 535. Rich on Wills, 407. 1. Peer. Wms. 43. 767. Cowp. 140.

The question was, Whether this administration was well granted to the lady?

 It

LORD GRANDISON against COUNTESS OF DOVER.

It was argued now by DR. MASTER *for the plaintiff*; and afterwards by a common lawyer on the same side, in *Hilary Term* following; and by DR. REINES, and SIR WILLIAM WILLIAMS, *for the defendant*.

The civilian argued, That the father of both the children died intestate, and that their mother administered, and afterwards [24] * made a will, of which she appointed *my Lord* to be executor, and thereby committed the infant to his custody; which being in fact true, the curatorship of the living child, by the civil law, draws to it the administration of the estate of the dead child. The statute 12. *Car.* 2. c. 24. s. 8. empowers the father by deed or will to dispose the custody of his child under age to any in possession or remainder, who may take the profits of his lands, and possess himself of the said infant's personal estate, and bring actions in relation thereunto, as a guardian in socage might have done. And wherever a father or mother (*a*) has made such a disposition, a Judge cannot assign a guardian. The spiritual courts have power to repeal this administration granted to my *Lady Dover*; the right is not in question, for whoever has it reaps no advantage, because it is for the benefit of the infant; the contest is, Who ought to be admitted by the spiritual court to administer? It cannot be denied but that the *great-grandmother* is a degree more remote than the *grandfather*: if therefore that court hath entrusted one who ought not to have administration, they have an undoubted power in such case to make an alteration. If *my Lord* had been administrator, it had been agreeable to the common law, for he is guardian in socage *durante minore ætate*.

8. Mod. 244. 327. 10. Mod. 21. 105. 386. 11. Mod. 145. 223. 12. Mod. 194. 1. Vern. 25. 326. 397. Fitzg. 110. 125. 1. Ld. Ray. 262. 338. 2. Ld. Ray. 1071. 1. Stra. 481. 552. 2. Stra. 892. 1137. Comyns, 3. 17. 110. 150. 2. Peer. Wms. 576. 3. Peer. Wms. 41. 337.

E CONTRA it was said, That *my Lord* was really indebted to the estate of the infant intestate; and therefore, as this case is, the spiritual court ought not to repeal the administration once granted, for it is for the benefit of the infant. It is not material who shall be administrator; for he who is so *durante minore ætate* hath no power over the estate; he is only a curator in the civil law, which is in the nature of a bailiff in our law, who hath only power to sell *bona peritura*. Probate of wills did not originally belong to the spiritual courts *de jure*; they had that authority *per consensum regis et magnatum*: and as those courts had not original jurisdiction in such cases, so they had no power to grant administration till enabled by the statute of 31. *Edw.* 3. c. 11.; for before that time the kings of *England* by their proper officers *solebant capere bona intestatorum in manus suas* (*b*). [* 25] * It is plain that the ordinary had no power by the common law over an intestate's estate, for he could not maintain an action to recover any part of it. Now if the law had given him a power over the goods, it would likewise have given him an authority or remedy to recover them. An action would have lain against him at the common law, and by the statute of 13. *Edw.* 1. c. 19. which was made in affirmance

(*a*) *Quære* of the mother. *Note to* FORMER EDITIONS.
(*b*) 9. Co. 36. 2. Bac. Abr. 398.

thereof,

thereof, if he had possessed himself of such goods, and refused to pay the debts. Then since he hath no original power in this case, and this being a special kind of administration, when he hath once executed that power he shall not repeal it.

Lord Grandison *against* Countess of Dover.

And THE COURT inclined to that opinion (*a*). *Vide* 9. *Co. Henslow's Case.*

(*a*) The administration *durante minore ætate* was granted to *Lady Dover*. A suit was instituted in the spiritual court by *Lord Grandison*, praying that these letters of administration might be repealed, and administration granted to him as being nearer of kin to the intestate. *Lady Dover* applied for a prohibition, which was granted; and *Lord Grandison*, in order to obtain a consultation, declared; to which declaration *Lady Dover* demurred. THE COURT, on the first argument, inclined that the prohibition should stand, but they took time to consider, and, after hearing a second argument, were of the same opinion; but it does not appear that any judgment was given. S. C. Skin. 156.

Memoranda.

Case 4.

NOTTINGHAM, *Lord Chancellor*, died in the vacation after this Term, and SIR FRANCIS NORTH was made *Lord Keeper of the Great Seal.*

North made Lord Chancellor, *vice* Nottingham deceased.—2. Show. 252. T. Jones, 231. Ray. 474.

SIR FRANCIS PEMBERTON, *Chief Justice* of the King's Bench, was made *Chief Justice* of the Common Pleas.

Pemberton transferred from *King's Bench* to *Common Pleas.*—2. Show. 252. T. Jones, 231.

SIR EDMOND SAUNDERS, on the first day of the succeeding *Hilary Term*, was created a *Serjeant at Law*, and made *Chief Justice* of the King's Bench, in the room of SIR FRANCIS PEMBERTON. The motto on his serjeant's rings was, "*Principi* "*sic placuit.*"

Saunders made Chief Justice of King's Bench.
2. Show. 252.
T. Jones, 231.
Skin. 122. Ray. 478.

SIR WILLIAM DOLBEN, in the vacation after 34. & 35. *Car.* 2. was discharged from his office as Judge in the Court of King's Bench.

Dolben discharged.
2. Show. 283.
Raym. 496.

SIR FRANCIS WYTHENS was made a Judge, in the place of SIR WILLIAM DOLBEN, and on the first day of *Easter Term* was made a Serjeant, and gave rings with this motto, "*Regi lex* "*placuit.*" He was sworn in on the afternoon of the same day at the Lord Keeper's house.

Wythens made a Judge of King's Bench.
2. Show. 283.

SIR EDMOND SAUNDERS, *Chief Justice* of the King's Bench, having long been in a state of ill-health, died on *Tuesday* 19. *June* 35. *Car.* 2. about ten o'clock in the forenoon, at his house at *Parson's Green.*

Death of Saunders.
2. Show. 298. 308.
T. Jones, 234.

Sir Francis Pemberton displaced.

2. Show. 311.

Sir Francis Pemberton, in the vacation after *Trinity Term* 35. *Car.* 2. after selling the place of *Sir Thomas Robinson*, one of the Prothonotaries of the Court, was discharged from the office of *Chief Justice* of the Common Pleas.

Jones made Chief Justice of C. B.

Mr. Justice Jones was made *Chief Justice* of the Common Pleas, in the room of *Sir Francis Pemberton*.

2. Show. 311. T. Jones, 234. Skin. 122.

Jefferies made Chief Justice of B. R.

Sir George Jefferies was made *Lord Chief Justice* of the King's Bench, in the place of *Sir Edmond Saunders*, deceased.

Holloway and Walcot promoted.

Holloway and Walcot were made Judges of the King's Bench.

MICHAELMAS TERM,

The Thirty-Fifth of Charles the Second,

IN

The King's Bench.

Sir George Jefferies, *Knt. Chief Justice.*

Sir Francis Wythens, *Knt.*
Sir Richard Holloway, *Knt.* } *Justices.*
Sir Thomas Walcot, *Knt.*

Sir Robert Sawyer, *Knt. Attorney General.*
Heneage Finch, *Esq. Solicitor General.*

*[26]

* Roe *against* Sir Thomas Clargis. Case 5.

It is actionable to call *a privy-councillor*, or *a deputy lieutenant* of a county, or a *justice of the peace*, A PAPIST.

S. C. Ray. 482. S. C. 3. Lev. 30. S. C. Skin. 68. 88. S. C. 1. Freem. 280. S. C. 2. Show. 250. Post. 103. 1. Roll. Abr. 56. Cro. Eliz. 306. 433. Salk. 694. 10. Mod. 197. Stra. 617. Ld. Ray. 1369. 2. Bl. Rep. 730.

WRIT OF ERROR, upon a judgment in the common pleas, in an action upon the case, wherein the plaintiff declared, that the king had made him one of his privy council in *Ireland*, and that he was a deputy lieutenant of the county of *Middlesex*, and had served in several parliaments for the borough of *Christ Church* in *Hampshire*; and that the king having summoned a parliament to meet at *Westminster*, he did stand to be a member of that borough, and that the defendant *Roe* did then speak these words of him, *viz.* "He," meaning the plaintiff, "is a papist." Upon a trial there was a verdict, and a judgment for the plaintiff.

The questions were these:

FIRST, Whether the words, abstracted from the offices set forth in this declaration, are actionable or not?

SECONDLY, Whether they are actionable as joined to those capacities?

ROE *against* SIR THOMAS CLARGIS.

SIR FRANCIS WINNINGTON, *for the plaintiff* in the errors, held the negative in both points.—FIRST, The word "papist" is not defined either by the common law, or by the statutes of this realm; for from the first of the queen to the twenty-fifth year of *Charles the Second* it is not to be found what *a papist* is. There are several statutes between those times which provide against the jurisdiction of THE POPE, and which inflict particular punishments upon committing offences therein prohibited, but none of [27] those laws give any definition of A PAPIST. * If by *a papist* is meant him who embraces the doctrine of THE POPE, it was punishable before the Reformation to be of a contrary opinion; now in the vulgar acceptation of the word, a man may hold the same opinion with THE CHURCH OF ROME, and yet not profess the popish religion, so as to bring himself in danger of any of the penalties in these laws. There was never yet an indictment against a person for being a papist, but many have been indicted upon the breach of those laws made against recusants, by which they incurred the penalties thereby appointed. In *Michaelmas Term* 27. *Hen.* 8. *pl.* 14. b. an action on the case was brought in the common pleas, for calling of the plaintiff "heretic;" and WILLOUGHBY, *the king's Serjeant*, argued that the action would not lie, because the word did import a spiritual matter, of which the temporal courts had no knowledge; and of that opinion were FITZHERBERT, *Chief Justice*, and SHELLEY, *Justice*: the same may be said in this case, that the word "papist" relates to something which is spiritual, of which this Court hath no cognizance. Words which are actionable must immediately injure the person of whom they are spoken, either in his profession, or bring him in danger of some punishment; as to call an attorney "bribing knave," which are adjectively spoken, yet it is an injury done to him in his profession (*a*). It was said at the trial in the common pleas, that it is actionable to call a man "papist" at this time, though it might not be so at another time. This seems to be a very vain assertion, for though the times may alter, the law is still the same. It would be a very great inconvenience, if men should be deterred by actions to call another man "a papist," for this would be an encouragement to popery, and a check upon the protestant religion, to punish the professors thereof for saying a man is "a papist," who is really so both in his judgment and profession. But admitting the word to be actionable, it is not so before conviction, for it is very improperly used, and of no signification or discredit before that time.

SECONDLY, These words are not actionable as coupled with his offices, because he hath alledged no particular damage or loss, and his offices are only honorary, and of no profit, and therefore he could receive no damage by speaking these words, if true, when they in no sort relate to his offices, and are too remote to be applied to them.

(*a*) Hob. 8. 1. Barnes, 340. 4. Term Rep. 366.

MR

Rex against Sir Thomas Clarges.

* MR. ROGER NORTH, *è contra.*—FIRST, The words are actionable in themſelves, for they ſcandalize the plaintiff in his reputation, and may be a means to bring him to corporal puniſhment; for by ſeveral acts of parliament many puniſhments are inflicted upon popiſh recuſants, which is the ſame thing with a papiſt; they are diſabled from holding any office or employment in the kingdom *(a)*; they are not to come into the king's preſence *(b)*, or within five miles of the city of *London (c)*; and the calling of him "papiſt" ſubjects him to the danger of being indicted for a traitor, for the words are ſynonymous. When *Henry the Eighth* took upon him the ſupremacy which THE POPE had unlawfully uſurped, there were certain papiſts in thoſe days who called themſelves "Roman Catholics," that they might be diſtinguiſhed from thoſe who bore allegiance to their lawful king; which general appellation was afterwards changed into the word "papiſt," ſo that both ſignify the ſame thing. The objection that though times change, the law is ſtill the ſame, may receive this anſwer, that when the force of words is changed with the times, thoſe words ſhall be actionable now, which were not ſo at another time *(d)*; as for example, the proper and genuine ſignification of the word "knave" is *a ſervant*, but now the times have altered the ſenſe of that word, and made it to be a term of reproach: ſo that it is actionable to call an attorney "knave," who is but a ſervant to his client. Then as to the objection that the word "papiſt" is not defined in our law, there is a ſtatute which diſables a man from having any office whatſoever who ſhall affirm the king to be a papiſt *(e)*, that is, a perſon who endeavours to introduce popery.

10. Mod. 111. 197.

Comyns, 262. 1. Stra. 304. 692. 2. Stra. 1138.

SECONDLY, But if the word "papiſt" is not actionable of itſelf, yet as coupled with his offices it is otherwiſe, and the plaintiff may well maintain this action.

And of that opinion was ALL THE COURT: ſo the judgment was affirmed *(f)*.

(a) By 3. *Jac.* 1. c. 5. ſ. 9. See 1. Hawk. P. C. 34.

(b) By 3. *Jac.* 1. c. 5. ſ. 2. See alſo 30. *Car.* 2. ſt. 2. c. 5. ſ. 6. and 1. Hawk. P. C. 35.

(c) By 3. *Jac.* 1. c. 5. ſ. 4. And ſee Dougl. 593. that on account of the penalties to which a papiſt is liable, a witneſs ſhall not be put to anſwer whether he is a papiſt or not.

(d) It is ſaid to have been decided, in the caſe of Savage *v.* Cook, that, "Thou art a papiſt, and not the queen's "friend," are not actionable. Cro. Eliz. 192.

(e) The 13. *Car.* 2. c. 1.; expired.

(f) See the caſe of Prin *v.* Howe, 7. Mod. 107. 2. Ld. Ray. 812. 1. Viner Abr. 442. 499. and 1. vol. Brown's Parl. Caſes, where it was held actionable to ſay of a juſtice of peace and deputy lieutenant of a county, "He is a "*Jacobite*, and for bringing in *popery* to "deſtroy our nation."

Case 6.

Malloon *against* Fitzgerald.

If a father settle his estate in trustees to the use of himself for life, with remainder in tail to an only daughter, provided she, with the consent of the trustees, marry a person of the same family, or a person who shall take upon him the same name, but if not, then the trustees to raise a portion for the maintenance of his daughter, and the remainder in tail to go to another; the estate-tail is not determined by the daughter's marrying, without the consent of the trustees, a person not of the family, and who did not take upon him the same name; although previous to the marriage she had *notice* of this settlement, but not, from the trustees themselves; for *express notice* is necessary, where the ancestor makes a condition which goes in restraint and abridgement of the estate of the heir.

ERROR of a judgment in *Ireland*, for lands in the county of *Waterford*. The case upon the special verdict was thus:

John Fitzgerald was seised in fee of the lands in question. He had issue *Katherine* his only daughter. He, by *lease and release*, made a settlement of those lands upon the *Earl of Offory* and other trustees therein named, and their heirs, to the use of himself for life, and after his decease to the use of * his daughter *Katherine* in tail, "PROVIDED that she married with the consent "of the said *earl* and the *trustees*, or the major part of them, or "their heirs, some worthy person of the family and name of *Fitzgerald*, or who should take upon him that name immediately "after the marriage; but if not, then the said earl should appoint "and raise a portion out of the said lands for the maintenance of "the said *Katherine*, with a remainder to *Lætitia* in tail." *John Fitzgerald* died, his daughter being then but two years old. She afterwards at the age of fourteen had *notice* of this settlement, but not by the direction of the trustees. On the 20th of *March*, in the sixteenth year of her age, she married with the plaintiff, *Edward Villiers, Esq.* without the consent of the trustees, or the major part of them; and her husband *Mr. Villiers* did not take upon him the name of *Fitzgerald* after the said marriage. *Lætitia* the aunt was married to *Franklyn*, who likewise did not take upon him the name of *Fitzgerald*.

The questions were,

FIRST, Whether the estate limited to *Katherine* be forfeited, without notice given to her of the settlement by the trustees themselves?

SECONDLY, Whether her estate be not determined by her marrying *Mr. Villiers* without their consent?

And it was argued, that the estate tail was determined.

And first as to the point of *notice*, It is not necessary to be given to the daughter, because the father had not made it in the settlement. He might dispose of his estate at his pleasure, and having made particular limitations of it, there is no room now for the law to interpose to supply the defect of notice in the deed. And to this purpose the *Mayor of London's Case* was cited, which was thus: *George Monox* devised certain houses in trust to his executors, and their heirs, upon condition to pay money to several *charitable uses*; which if not performed, then he devised them over to his heir in tail, upon the same conditions; and if not performed

* S. C. Skin. 125. 179. S. C. 2. Show. 315. S. C. 1. Eq. Abr. 333. 1. Vent. 199. 1. Mod. 86. 3. Lev. 21. Raym. 236. 2. Chan. Rep. 26. Lane, 60. 2. Ch. Caf. 116. 8. Co. 92. 1. Vezey, 387. 2. Atk. 242. 2. Com. Dig. "Condition" (L. 8.). 3. Bac. Abr. 23. 4. Bac. Abr. 323. 11. Mod. 48.

by

by him, then to the *Mayor and Commonalty of London*. The trusts were not performed by the first devisees. A stranger entered, and levied a fine with proclamations, and five years passed. Then the *Mayor of London* brought his action, supposing he had a right of entry for the non-performance of the trusts, but was barred by the fine, although it was argued for him, that he had not notice of the devise or breach of the trust till after the fine levied; which shews, that notice * was not necessary; for if it had been so when his title accrued, he could not have been barred by the fine (*a*). As *Katherine* the daughter takes notice what estate she hath in the land, so as to pursue a proper remedy to recover it, so she ought to take notice of the limitations in the settlement, and hath the same means to acquaint herself with the one as with the other; and the same likewise as her aunt had to know the remainder. Suppose a promise is made to indemnify another from all bonds which he should enter into for a third person, and then an action is brought against him, wherein the plaintiff declared, that he was bound accordingly, and not saved harmless, but doth not shew that he gave notice of his being bound, yet the plaintiff shall recover (*b*). As to the case of a copyholder having three sons who surrendered to the use of his will, and then devised to his middle son in fee, upon condition to pay legacies to his sisters at full age, which were not paid; although it was adjudged that his estate was not determined upon the non-performance of this condition without an actual demand and denial, and that he was not bound to take notice of the full age of his sisters, yet this is not an authority which can any-wise prevail in this case, because it is a condition to pay legacies, which is a thing in its nature not to be paid without a demand, which implies notice (*c*). In all cases where conditions are annexed to estates to pay money, there notice is necessary; but where estates are limited upon the performance of collateral acts, it is not necessary. And this has been held the constant difference. So is the case of *Fry v. Porter* (*d*), which was this: The *Earl of Newport* had two daughters, and he devised *Newport House* to the daughter of his eldest daughter in tail, which she had by the *Earl of Banbury*, "provided and upon condition that she marry with the consent of "her mother and two other trustees, or the major part of them;" if not, or if she should die without issue, then he devised the said

MALLOCK against FITZGERALD.

* [30]

(*a*) The Mayor of London *v.* Alford, Cro. Car. 576. S. C. Jones, 452. it was unanimously resolved, that the limitation over to the Mayor of London was void, it being *a possibility* upon a *possibility*; but the question whether the want of notice would aid was not, says *Croke*, "so unanimously resolved;" and *Sir William Jones* says expressly, that upon this point the Judges gave no opinion. See Fearne on Con. Rem. 176, 177.

(*b*) Cro. Jac. 432. Hob. 51. Jones, 207. Poph. 164.

(*c*) Curteis *v.* Wolverston, Cro. Jac. 56. But if the devise had been to the *eldest son*, then it had been *a limitation* annexed to his estate, and not *a condition*; because if it had been *a condition*, it would have descended upon the heir, who could not be sued for the breach. *Note to the* FORMER EDITION.

(*d*) 1. Mod. 86. 300. 1. Vent. 199. Rep. Chan. 140. Poph. 104.

house

MALLOON *against* FITZGERALD. house to *George Porter* in fee, who was the son of his youngest daughter, and who had married one *Thomas Porter* without her father's consent; the *Lady Ann Knowles*, the first devisee, married *Fry* without the consent of her grandmother or trustees; and it was adjudged against her upon point of notice, that it was not necessary, because her grandfather had not appointed any person to give notice; he might have imposed any terms or conditions

[31] * upon his own estate, and all parties concerned had the same means to inform themselves of such conditions. The third resolution in *Frances' Case* (*a*) comes nearest to this now in question; it was in *replevin:* the defendant avowed the taking *damage fesant*; the plaintiff pleaded in bar to the avowry, that *R. Frances* was seised in fee of the place WHERE, &c. and devised it to *John* (who was his eldest son) for sixty years, if he so long lived, remainder to *Thomas* for life, and that *John* made a lease to the plaintiff for a year; the defendant replied, that after the devise *R. Frances* made a feoffment in fee of the same lands, amongst others, to the use of himself for life; then as to the other lands, to divers uses contained in the deed; but as to those lands in which the distress was taken, to the same uses as in the will; in which conveyance there was this proviso, "That if *John* "should disturb his executors in the quiet enjoyment, &c. or if he "shall not suffer them to carry away the goods in his house, then "the uses limited to him should be void:" he did hinder the executors to carry away the goods, yet it was adjudged that he should keep his estate, because being a stranger to the feoffment, he shall not lose it without notice of the proviso. But, in answer to that case, notice was not the principal matter of that judgment; it turned upon a point in pleading, for the avowant had not shewed any special act of disturbance; and a bare denial, without doing any more, was held to be no breach of the condition. Some other authorities may be cited to prove notice necessary; as where tenant for life of a manor to which an advowson was appendant did, in the year 1594, present *Durston*, who neglecting to read the Articles was deprived nine years afterwards by the ordinary, at the suit of the patron who presented him, who also died two years after the deprivation; then the queen presented by lapse, whose presentee was inducted, and six years afterwards *Durston* died, after whose death he in remainder presented *Green*; now though the patron was a party to the suit of deprivation, and thereby had sufficient notice that the church was vacant, yet it was adjudged that a lapse should not incur but only after notice given by the ordinary himself, and not by any other person whatsoever (*b*). But this case may receive this answer, *viz.* That notice had not been necessary at law; but it was provided by a particular act of parliament (*c*), that no title by lapse shall accrue upon any deprivation but after six months notice thereof given by

(*a*) 8. Co. 90. (*b*) Green's Case, 6. Co. 24. S. C. Co. Ent. 686.
(*c*) 13. *Eliz.* c. 12.

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Malloon against Fitzgerald.

the ordinary himself to the patron. * It is true, the law is very tender in divesting the rights of the subject; but where an estate is created by the act of the party, and restrained by particular limitations without any appointment of notice, there the law will not add notice and make it necessary, because the person who made such a disposition of his estate might have given it upon what conditions he pleased. Therefore it may seem hard that this estate should be determined by the neglect or omission of the trustees to give notice of this proviso; but it is apparent, that it was the intent of the father it should be so; for by this limitation the estate is bound in the hands of an infant: the reason is, because there is a privity between an heir and an ancestor, and therefore the heir is bound to take notice of such conditions which his ancestor hath imposed on the estate.

Secondly, This estate is determined by the marriage of the daughter with *Mr. Villiers*, because there is an express limitation in the deed for that very purpose; she is enjoined to marry a *Fitzgerald*, or one who should take upon him that name, which is still more extensive; and she having neglected to do the one, and her husband having refused to do the other, the aunt in remainder shall take advantage of this non-performance. And it is this remainder over which makes it *a limitation*; for if it had been *a condition*, then the intent of the father had been utterly defeated (*a*); for none but the heir at law can enter for the breach of a condition, and such was *Katherine* in this case. The proviso in this deed depends upon another sentence immediately going before, to which it hath reference, and then by the express resolution in *Cromwel's Case (b)*, it is a limitation or qualification of the estate, and not a condition, which estate is now determined without entry or claim.

It was argued, *è contra*, that in this case three things are to be considered:—First, The nature of th. proviso.—Secondly, That notice is absolutely necessary.—Thirdly, That the notice given was not sufficient, being not such as is required by law. *[33]

As to the first, The very nature of this proviso is condemned by the civil law; and, because it works the destruction of estates, it hath never been favoured at the common law. All conditions to restrain marriage generally are held void by both laws; so likewise are such which restrain people from marrying without the consent of particular persons; because they may impose such hard terms before they give their consent, as * may hinder the marriage itself; and therefore a bare request of such, without their subsequent assent, has been always allowed to preserve the estate.

1. Vern. 20. 83. 223. 354. 412. 2. Vern. 223. 721. Prec. Ch. 227. 348. 562. 12. Mod. 182. Gilb. Eq. Rep. 26. Comyns, 726. Cases Temp. Talb. 214. 1. Pr. Wms. 284. 2. Pr. Wms. (626). (628). 3. Pr. Wms. 65.

Secondly, And which was the principal point, notice in this case is absolutely necessary, both by the intent of the father, and

(*a*) 1. Vent. 202. Owen, 112. S. C. Jenk. 272. S. C. 2. And. 69. Goldsb. 152. Litt. sect. 723. S. C. Moor, 471. S. C. Savil, 115.

(*b*) Cromwell *v.* Andrews, 2. Co. 69. and Co. Lit. 103.

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MALLOON against FITZGERALD

by the conſtruction of the law. There are three things of which the law makes an equal interpretation, *viz.* uſes, wills, and acts of parliament, in which if the intention of the parties and of the law-makers can be diſcerned, the caſes which ſeverally fall under the direction of either ſhall be governed by the intention, without reſpect to the diſagreeing words, nay ſometimes the law will ſupply the defect of words themſelves. The Books are full of authorities where conſtructions have been made of acts of parliament according to the intent of the makers, and not ac-
2. Mod. 444. cording to the letter of the law. As in the caſe of *Eyſton v. Stud* in the *Commentaries (a)*, where the huſband and wife levied a fine of the lands of the wife, and declared the uſes to their heirs in tail, the remainder to the heirs of the wife, they had iſſue, and the huſband died; the widow married a ſecond huſband, and he and his wife join in a ſecond fine, and declared the uſes thereof to themſelves for life, the remainder to the huſband and his heirs for ſixty years, the remainder in tail to their iſſue, the remainder to the heirs of the wife; the iſſue of the firſt huſband entered, ſuppoſing the eſtate had been forfeited by the ſtatute of 11. *Hen.* 7. c. 20. which enacts, "That if a woman hath an eſtate in dower, or in "tail, jointly with her huſband, or to herſelf, of the inheritance "or purchaſe of him, and ſhe doth, either ſole or with another "huſband, diſcontinue, it ſhall be void, and he in the remainder "may enter." Now this caſe was directly within the words of the ſtatute, for the woman had an eſtate tail in poſſeſſion jointly with her firſt huſband, which ſhe had diſcontinued by joining in the fine with her ſecond huſband; but yet it was adjudged no forfeiture, becauſe it was not within the intent of the ſtatute to reſtrain women to diſpoſe of their own eſtates, but only ſuch as came from the huſband. So here, uſes are in the nature of private laws, and muſt be governed by the like intention of the parties: now it is not to be ſuppoſed that the father did intend to diſinherit his only daughter and heir without notice of this ſettlement; therefore though he had not appointed any perſon in particular to give her notice, yet it muſt of neceſſity be preſumed that
* [34] his intention * was, that ſhe ſhould have the eſtate, unleſs ſhe had refuſed upon notice to comply with thoſe conditions impoſed upon
3. Peer. Wms. 246. her. Now the daughter being heir at law, and ſo having a good title by deſcent, if there be any conveyance made by her anceſtor to defeat that title, and to which ſhe is a ſtranger, ſhe ought by the rules of law and reaſon to have notice of it; and ſo is the expreſs reſolution in *Frances's Caſe* (*b*), where the deviſe and the feoffment were both made to the heir at law: and the reaſon why in the caſe of *Fry v. Porter* (*c*) notice was not held neceſſary was, becauſe the deviſe was to a grand-daughter, who was not heir at law; for the *Earl of Newport* had three ſons then living, and therefore the parties whom it concerned had the ſame means to inform themſelves upon what conditions they were to have the eſtate.

(*a*) Plowd. part 2. 463. (*b*) 8. Co. 90. (*c*) 1. Mod. 88.

THIRDLY,

Mallet against Fitzgerald.

THIRDLY, The notice here given was not sufficient; for as the ordinary himself, in *Green's Case* (*a*), ought to have given the patron notice of the deprivation before a lapse should incur, so the trustees here ought to give the daughter notice of this proviso before she shall lose her estate for non-performance of the conditions on which she should take it, especially since the notice she had of this proviso was not certain; for it is said she had notice not to marry without the consent of the trustees, but it is not shewed who they are, or how she should apply herself to them. Besides, there is something in this proviso which the finding in the verdict will not supply; for it may be literally true, that the daughter married without the consent of the trustees, and yet no breach of the condition, because the proviso is to restrain her from marrying without the consent of them or their heirs: now it was not found that the feoffees were then living, and if they were dead their consent cannot be required, and she might have the consent of their heirs. *Mr. Franklyn*, who was the husband of *Lætitia* the aunt in remainder, hath likewise forfeited that estate which he hath, or may have, in right of his wife (if she had any right), by not taking upon him the name of *Fitzgerald*; for if the father would have disinherited his daughter for non-performance of this proviso, *à fortiori* he shall be intended to disinherit his sister for making frustrate his desire in the settlement of his estate.

In *Easter Term* following judgment was given, That the estate tail was not determined for want of notice, according to the resolution in *Frances's Case* (*b*).

(*a*) 6. Co. 24.

(*b*) See the case of Burleton *v.* Humfrey, Ambler's Rep. 256.; Scott *v.* Tyler, 2. Brown's Cas. Chan. 431. to 490. See also Mr. Hargrave's Notes, Co. Lit. 202, 203, 204.; and the case of Hervey *v.* Aston, in Mr. Rose's edition of Comyn's Rep. 726. to 757.

*[35]

Case 7.

* Hinton *against* Roffey.

In pleading the statute of Usury to an action of debt, the *corrupt agreement* and the *usurious interest* taken must be set out in the plea.

AN ACTION OF DEBT was brought against the defendant, who pleaded the statute of Usury, but did not shew any particular agreement, only in general that he was indebted to the plaintiff in a sum not exceeding one hundred and eighty pounds; neither did he set forth when the interest of the money did commence, and on what day it became due.

S. C. 2. Show. 329.
1. And. 49.
1. Sid. 285.
1. Keb. 629.

Upon a demurrer it was objected, that this plea was too general, because the defendant ought to shew in particular what the sum was in which he was indebted, and how much the plaintiff took above 6*l. per cent.* (*a*); for if the certainty thereof did not appear, there could be no fact applied to it.

Noy, 143. Cro. Jac. 440. Cro. Car. 501. 2. Vern. 170. 402. 1. Hawk. P. C. 533. 2. Ld. Ray. 10. Mod. 66. 179. 11. Mod. 174. 12. Mod. 385. 517. Stra. 498. 816. 1043. 1144. Cowp. 72. 671. Dougl. 235. 1. Term Rep. 153. 3. Term Rep. 531.

(*a*) By the statute 12. Car. 2. c. 13.; reduced to five *per cent.* by 12. Ann. c. 16.

But

HUTTON against ROFFEY.

But *on the other side* it was alledged, that it was not material to shew the certain sum which the plaintiff took above *6l. per cent:* and therefore not necessary to set forth the particular agreement between them; for having pleaded, and made a substantial averment to bring his case within it, it is well enough, without shewing how much he took above six in the hundred. And this case was compared to debt against an administrator, who pleaded in bar a judgment, &c. *(a)* and that he had fully administered, and had not assets *præterquam bona, &c. non attingen.* to five pounds: and upon demurrer this was held a good plea; for though in strictness of pleading the defendant ought to have shewed the certain value of the goods, and not to have said *non attingen.* to five pounds, yet the substance sufficiently appears, that he had not more than five pounds to satisfy a debt of an hundred pounds, for which that action was brought.

JEFFERIES, *Chief Justice*, and THE COURT gave judgment for the plaintiff, because the defendant ought to have set forth the agreement, and to have applied it to the sum in the declaration.

(a) Moon *v.* Andrews, Hob. 133.

*[36]
Case 8.

* Smith *against* Goodier.

Attornment must be proved where an ejectment is brought for a manor, parcel in rent and services, &c.

2. Roll. Abr. 293.
Lit. f. 553.
Dougl. 282.

IN EJECTMENT for the manor of *Heythorpe*.—Upon not guilty pleaded, there was a trial at bar by an *Oxfordshire* jury.

The title of the lessor of the plaintiff was, That *Edmund Goodier, Esq.* was seised in fee of the said manor, part in demesnes, some part in leases for years with rent reserved, and some part in services; and being so seised made a feoffment in fee to *Sir John Robinson* and *Sir William Rider*, and their heirs, in trust for *Sir Robert Masham:* this deed was dated in 1647, and the consideration was five thousand pounds, paid to *Goodier*; there was a letter of attorney of the same date with the deed, and livery and seisin indorsed.

MAYNARD, *Serjeant*, who was of counsel *for the defendant*, put the plaintiff to prove *an attornment* of the tenants; for having declared for a manor, parcel in rents and services, those would not pass without *an attornment*.

And of this opinion was THE WHOLE COURT. But the plaintiff would not prove an attornment *(a)*.

(a) By 4. & 5. *Ann.* c. 16. "All grants and conveyances of any manors or rents, or of the reversion or remainder of any messuages or lands, shall be good without attornment of the tenants; provided no such tenants shall be damaged by payment of rent to any such grantor or conusor, or by breach of any condition for non-payment of rent before notice given him of such grant by the conusee or grantee."—And by 11. *Geo.* 2. c. 19. "The attornment of tenants to strangers claiming title to the estates of their landlords shall be absolutely null and void, and the possession of the landlord no way changed, altered, or affected by such attornment, &c. &c. &c."—And see the case of Moss *v.* Gallimore, Dougl. 283. 1. Term Rep. 384. 647.

The

The defendant made a title under the marriage-settlement of the said *Goodier*, who in the seventeenth year of *James the First* married *Elizabeth Mees*, and then he settled the said manor upon himself for life, and upon his issue in tail male, and that the defendant was the heir in tail.

Quære, If a marriage-settlement, the *original* and *counterpart* of which remain in the hands of the *covenantor*, is fraudulent against purchasors? 2. Ter. Rep. 41.

But *on the other side* it was insisted, that this settlement was fraudulent against the purchasor, and that it could not be thought otherwise, because both the original and counterpart were found in *Mr. Goodier's* study after his death. And because he had made oath before a master in chancery, that there was no incumbrance upon the estate;

The affidavit was produced in court, but not suffered to be read but as *a note* or *letter*, unless the plaintiff would produce a witness to swear that he was present when the oath was taken before the master *(a)*.

A mere voluntary affidavit cannot be read in evidence as an *affidavit*, unless proved to have been sworn; but on proving the signature it may be read as a *note* or *letter*.—1. Vern. 53. 413. 1. Ld. Ray. 311. 2. Ld. Ray. 734. 893. 936. 2. Vern. 471. 547. 551. 591. 603. Prec. Ch. 59. 116. 212. 9. Mod. 66. 11. Mod. 210. 262. 12. Mod. 136. 231. 305. 310. Fitzg. 197. 1. Stra. 35. 68. 162. 545. 2. Stra. 920. 3. Peer. Wms. 131. 1. Show. 397. Bull. N. P. 238.

*[37]

And an objection was made to the settlement itself, which recited, "WHEREAS a marriage was intended to be had between "the said *Edmund Goodier* and *Elizabeth Mees*: now in consideration thereof and of a portion, &c." he conveyed the said manor to the feoffees, to the use of himself for life, and after his decease to the use of the said *Elizabeth* for life, but doth not say, "from and after the solemnization of the said marriage;" so that * if she had not married *Mr. Goodier*, yet after his decease she would have enjoyed the estate for life.

Quære, If a deed of settlement, reciting it to be made in consideration of marriage, but without saying, "from and after the solemnization of the said marriage," be good?

Upon the whole matter the jury found for the defendant.

(*a*) One *Lamb* was indicted at the Spring assizes 1792 for a capital offence; a paper writing was received in evidence, the contents of which, it was proved, had been taken from the mouth of the prisoner as a confession before a magistrate, and afterwards read over and assented to by the prisoner, but he had refused to sign it. It was objected, that this could not be read as *an examination* under 2. & 3. *Phil. & Mary*, c. 10. But the twelve Judges determined, that it was well received, as a note or paper in writing. *MSS.*

The King *against* Coney and Obrian. Case 9.

DEFENDANTS were convicted for the murder of *Mr. Tyrrwhite* and *Mr. Forster* in a duel, and now pleaded their pardon, in which there was a clause *non obstante* the statute of 10.

Murder may be pardoned without the word *murder* being inserted in the pardon.—S. C. Skin. 157. S. C. 2. Shew. 334. T. Jones, 56. Moor, 752. Keilw. 91. Stand. 101. 3. Inst. 236. Stiles, 375. March, 217. Show. 283. 1. Lev. 80. 8. Mod. 6. 2. Hawk. P. C. 545. Ld. Ray. 215. 637. Salk. 499. 1. Hale, 466. 3. Bac. Abr. 806.

THE KING *against* CONEY AND OBRIAN.

Edw. 3. c. 3. which appoints him who hath a pardon of felony to find sureties for his good behaviour (*a*) before it shall be allowed; and another *non obstante* to the statute of 13. *Rich.* 2. c. 1. which enacts, "that if the offence be not specified in the pardon, it shall "not be allowed (*b*)." Now the word "*murdrum*" was not in this pardon; the offence was expressed by these general words, *felonicâ interfectione*:

And, Whether it extended to pardon murder? was the question.

MR. ASTRY, the clerk of the crown, informed the Court, that one *Alexander Montgomery* of *Eglington* pleaded the like pardon for murder, but it was held insufficient, and the Court gave him time to get his pardon amended; which was done likewise in this case.

The defendants came again on another day, and, counsel being allowed to plead for them, insisted that the pardon was good, and that the murder was sufficiently pardoned by these words; that it is in the power of the king to pardon by general words, and his intent did plainly appear to pardon the defendants: That the murder of a person is rightly expressed by *felonious killing*, though not so properly as by the word *murdrum* itself, the omission of which word will not make the pardon void. And to prove this he cited the sheriff of *Norfolk's Case* (*c*), who was indebted to the king during the time he was sheriff, and was pardoned by the name of *J. W. Esquire* (who was the same person) *de omnibus debitis et computis*, &c.; afterwards he was charged in the exchequer for one hundred pounds, where he pleaded this pardon; and it was held good, though he was not named *sheriff*, and so not pardoned by the name of his office; yet the king's intention appearing in his charter, and having pardoned him by his right name, that was sufficient, and in that case the king himself was concerned

*[38] in point of interest. * The Books all agree (*d*), that before the

Gilb. Eq. Rep. 221. 12. Mod. 119. 1. Stra. 516. 1. Ld. Ray. 214.

statute of 13. *Rich.* 2. c. 1. the king might pardon *murder* by the word *felony*; now this prerogative, being incident to the crown, and inseparable from the person of the king, was not designed to be wholly restrained by that act; for the parliament only intended

(*a*) By 5. & 6. *Will. & Mary*, c. 13. the statute of 10. *Edw.* 3. c. 3. is repealed; and it is enacted, "That "the justices before whom any pardon "for felony shall be pleaded, may at "their discretion remand or commit the "person who pleads it to prison till he or "they shall enter into a recognizance "with two sufficient sureties for the "good behaviour for any time not exceeding seven years; PROVIDED that "if such person be *an infant* or *feme covert*, he or she may find two sufficient sureties, who shall enter into a "recognizance for his or her being of "the good behaviour as aforesaid."— But there has been no instance since this statute of the Court's requiring a recognizance for the good behaviour of a person pardoned for murder. Rex v. Chetwynd, Strange, 1203. 9. State Trials, 542. 1. Bl. Rep. 479. 2. Bl Rep 757.

(*b*) By 1. *Will. & Mary*, sess. 2. c. 2 it is declared and enacted, that no dispensation by *non obstante* of or to any statute, or any part thereof, shall be allowed, &c. See Co. Lit. 99. 2. Hawk P. C. 552, 553. 1. Sid. 6.

(*c*) 2. *Rich.* 3. pl. 7. a.

(*d*) See Lucas's Case, Moor, 752 8. Co. 18. 3. Inst. 234.

that

that by ſpecifying the offence in the pardon the king ſhould be rightly informed of the nature of it; and when he underſtands it to be *murder*, he would not grant a pardon. But admitting his power to be reſtrained by that ſtatute, yet a *non obſtante* is a diſpenſation of it, and therefore this pardon ought to be allowed (*a*).

THE KING *againſt* CONEY AND OBRIAN.

The pardon was held good by THE WHOLE COURT;

And JEFFERIES, *Chief Juſtice*, ſaid, that he had propoſed this caſe to all the Judges of *England*, and they were all of the ſame opinion; and that he remembered *Dudley's Caſe* (*b*), where a pardon in general words was allowed.

(*a*) Staundf. P. C. 101.

(*b*) Rex *v.* Dudley, in Trinity Term 20. *Car.* 2. The pardon in this caſe was general, of "all treſpaſſes, *murders*, robberies, felonies, &c." with a *non obſtante* of the ſtatute of 13. *Rich.* 2. c. 1. or any other ſtatute. The Court inclined that this pardon ought not to be allowed, for that a general *non obſtante* was not ſufficient, without reciting the effect of the indictment as to the offence of which the party was convicted; for that the king could not pardon *murder* without a ſpecial recital of the fact: and the counſel for the priſoner perceiving the inclination of the Court, adviſed him to endeavour to procure another pardon with ſpecial words. 1. Sid. 366. *Mr. Serjeant Hawkins*, however, admits it to have been adjudged, that *a murder* might be well pardoned under the general deſcription of a *felonious killing*, with a *non obſtante* of the 13. *Rich.* 2. c. 1. But he doubts the propriety of ſuch determination. See 2. Hawk. P. C. ch. 37. ſ. 17.

HILARY TERM,

The Thirty-Fifth of Charles the Second,

IN

The King's Bench.

Sir George Jefferies, *Knt. Chief Justice.*

Sir Francis Wythens, *Knt.*
Sir Richard Holloway, *Knt.* } *Justices.*
Sir Thomas Walcot, *Knt.*

Sir Robert Sawyer, *Knt. Attorney General.*
Heneage Finch, *Esq. Solicitor General.*

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* Brason *against* Dean.

Case 10.

A COVENANT upon a charter party for the freight of a ship.

A penal statute cannot have a retrospective operation; and therefore if a man covenant to do a thing, and it is afterwards prohibited, yet the covenant is binding.

The defendant pleaded, that the ship was loaded with French goods prohibited by law to be imported;

And upon demurrer judgment was given for the plaintiff:

For THE COURT were all of opinion, that if the thing to be done was lawful at the time when the defendant entered into the covenant, though it was afterwards prohibited by act of parliament, yet the covenant is binding (*a*).

Dyer, 27.

1. Salk. 198. Comyns, 333. 627. 1. Ld. Ray. 321. 2. Ld. Ray. 1459. 12. Mod. 169.

(*a*) See the case of Gilmore *v.* Shooter, 2. Mod. 310.; Brewster *v.* Kitchell, 1. Salk. 198.; Portington *v.* Rogers, 2. Brownl. 142.; Wilkinson *v.* Meyer, 2. Ld. Ray. 1352.

Case 11. **Barnes *against* Edgard.**

In trespass for entering the plaintiff's close and *impounding* his cattle, he shall have *full costs*, though the damages are under *forty shillings*.

TRESPASS for breaking his close and impounding of his cattle: upon *not guilty* pleaded, the plaintiff had a verdict, but damages under forty shillings.

MR. LIVESAY, *the secondary*, thereupon refused to tax full costs, alledging it to be within the statute of 22. & 23. *Car.* 2. c. 9. by which it is enacted, "That in all actions of trespass, "assault and battery, and other personal actions, wherein the Judge "shall not certify upon the back of the record, that a battery was "proved, or the freehold or title of the land chiefly in question, "if the jury find the damages under forty shillings, the plaintiff "shall recover no more costs than damages."

* [40]

2 Vent. 36. 2. Mod. 141. Ray. 487. 5. Mod. 74. 316. Comb. 324. Skin. 666. 8. Mod. 371. Fitzg. 42. 9. Mod. 193. 1. Wils. 93. Stra. 534. 1130. 1232. Ld. Ray. 566. 1444. Bunb. 207. 2. Com. Dig. 546. 1. Bac. Abr. 512, 513. 3. Burr. 1282. Gilb. Eq. Cases, 195. Dougl. 107. Bull. N. P. 329. 1. Term Rep. 655. 2. Term Rep. 235. 3. Term Rep. 37. 391.

MR. POLLEXFEN moved for costs, alledging that this act does not extend to all trespasses, but only to such where the freehold * of the land is in question (*a*). If the action had been for a trespass in breaking his close, and damages given under forty shillings, there might not have been full costs; but here is another count for *impounding* the cattle, of which the defendant is found guilty, and therefore must have his costs. The like case was adjudged in this court in *Hilary Term* last (*b*), which was trespass for breaking and flinging down stalls in the market-place; the plaintiff had a verdict and two-pence damages (*c*); and upon a debate whether he should have full costs, the Court were of opinion, that it was not within that statute, because the title could not come in question upon the destruction of a chattel.

In the principal case the plaintiff had ordinary costs (*d*).

(*a*) See the case of Cockerel *v.* Allanson, in the king's bench, Trinity Term, 22 *Geo.* 3. MSS. and Dougl. 780.

(*b*) Smith *v.* Batterton, Raym. 487. Jones, 232.

(*c*) By 8. & 9. Will. 3. c. 11. s. 4. in all actions of "trespass, brought in the "courts at *Westminster*, wherein at the "trial of the cause it shall appear and "be certified by the Judge under his "hand upon the back of the record, "that the trespass was *wilful and malicious*, the plaintiff shall have *full* "*costs*." See also 23. *Geo.* 2. c. 33. s. 19.

(*d*) See the case of Clegg *v.* Molyneux, Dougl. 779.; Knightley *v.* Buxton, Sayer on Costs, 39.; Cotterell *v.* Tolly, 1. Term Rep. 655.; Mears *v.* Greenaway, 1. H. Bl. Rep. 291.; Lately *v.* Fry, Mr. Rose's edition Comyns Rep. 19.—See also Bull. N. P. 329. Mr. Kyd's edition of Com. Dig. 3. vol. 235. (A. 3.) and Mr. Hullock on Costs, 74. where all the cases upon this subject are collected.

EASTER TERM,

The Thirty-Sixth of Charles the Second,

I N

The King's Bench.

Sir George Jefferies, *Knt. Chief Justice.*

Sir Francis Wythens, *Knt.*
Sir Richard Holloway, *Knt.* } *Justices.*
Sir Thomas Walcot, *Knt.*

Sir Robert Sawyer, *Knt. Attorney General.*
Heneage Finch, *Esq. Solicitor General.*

*[41]

* Marsh *against* Cutler.

Case 12.

If debt be brought upon a specialty for part of the sum, the plaintiff must shew how the other is discharged.

THE PLAINTIFF obtained a judgment in an hundred court for fifty-eight shillings and four-pence, and brought an action of debt upon that judgment in this court for fifty-eight shillings only, and did not shew that the four-pence was discharged.

And upon "*nul tiel record*" pleaded, and a demurrer to that plea, the declaration was held to be naught for that very reason; for if a debt upon a specialty be demanded, the declaration must be for the whole sum; if for less, you must shew how the other was satisfied.

Cro. Jac. 498, 499. 529. 530. Yelv. 5. Cro. Eliz. 583. 10. Mod. 7. 69. 277. 324. 11. Mod. 34. 12. Mod. 81. Ld. Ray. 816. Bunb. 166. 5. Com. Dig. "Pleader" (2. W. 7.). (2. W. 13.).

The Earl of Macklefield's Case.

Case 13.

Special bail denied in a *scandalum magnatum.*

THE PLAINTIFF brought an action upon the statute *de scandalis magnatum* against *Sir Thomas Grosvenor*, for that he, being foreman of the grand jury in *Cheshire*, spoke these words of the plaintiff, "He is a tedious man, and a promoter of sedition "and tedious addresses."

The plaintiff desired that the defendant might put in *special bail*;

2. Mod. 215. 11. Mod. 9. 49. 12. Mod. Comyns, 7. 1. Stra. 422. 2. Stra. 807. 1079. Tidd's Pract. 34.

But

THE EARL OF MACKLESFIELD'S CASE.

But THE COURT would not grant it, and said it was a discretionary thing, and not to be demanded of right: it was denied to the *Duke of Norfolk*, unless oath made of the words spoken.

THE COURT therefore ordered *common bail* to be filed.

* [42]

Case 14.

* Holloway's Case.

If an outlaw for high treason do not surrender himself within the year, the outlawry cannot be reversed without *the attorney general's* consent.

S. C. 3. State Trials, 855. Post 47. 72. 2. Roll. Abr. 804. 1. Sid. 69. 1. Bulst. 71. Stra. 824. 2. Vern. 312. 8. Mod. 26. 10. Mod. 188. 380. 409. 11. Mod. 173. 12. Mod. 544. 626. 668. 1. Ld. Ray. 154. 5. Com. Dig. 651. 1. Vern. 170 175. 1. Burr. 641. 2. Hawk. P. C. 655. 3. Bac. Abr. 777. 1. Peer. Wms. 445. 690. 2. Peer. Wms. 269.

HE was taken at *Nevis* in the *West Indies*, and brought over hither, and now appeared in custody at the bar, being outlawed for *high treason* in the late conspiracy.

SIR SAMUEL ASTRY, *clerk of the crown*, read the indictment upon which he was outlawed.

And the king by his ATTORNEY GENERAL consented that the outlawry should be reversed (*a*) (which could not have been done without such consent), and that he might come to his trial.

But he having nothing to alledge in his defence, other than he had made an ingenuous confession to the king, and hoped that he might deserve mercy;

THE COURT made *a rule (b)* for his execution to be on Wednesday following, and did not pronounce any sentence against him; and he was executed accordingly.

(*a*) 1. Sid. 69. Ld. Ray. 154. 2. Salk. 495. 2. Vern. 312. 8. Mod. 26. 10. Mod. 188. 1. Peer. Wms. 445. 3. Bac. Abr 191.

(*b*) Finch, 478. 2. Hale, 409. Cro. Jac. 496. 2. Hawk. P. C. 657.

Case 15.

The King *against* Barnes, and Others.

To an excommunication on 1. *Eliz.* c. 2. for not resorting to his parish-church, the defendant may plead in the court below, or to the return of the *significavit* in the king's bench, that he heard divine service in another parish.

S. C. Skin. 176. Cro. Car. 197. 2. Vern. 34. Salk. 294. 7. Mod. 56. Ld. Ray. 619.

THE DEFENDANT *Barnes* and others were excommunicated for not coming to their parish-churches. They pleaded the statute of 5. *Eliz.* c. 23. which inflicts pecuniary penalties for not appearing upon the *capias*, but enacts, "That if the excommunicate person have not a sufficient addition according to the "statute of 1. *Hen.* 5. c. 5. or if in the *significavit* it be not contained that the excommunication proceeds upon several causes "in that statute mentioned, and amongst the rest, for refusing "to come to divine service, he shall not incur the penalties."

MR. POLLEXFEN now made these objections:

FIRST, The defendant was excommunicated for not coming to his parish-church, which is not required by this statute; for if he do not refuse to hear divine service in any church, the penalties are saved.

SECONDLY,

SECONDLY, The statute of additions requires that the condition and dwelling-place of the defendant shall be inserted; which was not done in this case, for they are excommunicated by the names of *A. B. mercator. B. C. scissor.* and *E. F. de parochiâ, &c.* which last addition of the parish shall refer to him only last mentioned, and not to all the rest; and so it was always ruled in indictments *(a)*.

In an [excom]munication three persons, if the name of a parish be added to the last name, it is sufficient to satisfy the 1. *Hen.* 5. c. 5.

* THE ATTORNEY GENERAL *contra.* The statute of 5. *Eliz.* c. 5. is grounded upon that of 1. *Eliz.* c. 2. which enjoins every person to resort to his parish-church, or, upon let thereof, to some other, or to forfeit twelve-pence every Sunday and holiday, to be levied by the churchwardens there for the use of the poor. Now though the parish is not named in this act, yet the law must be interpreted as it was then. * [43]

SECONDLY, The word "parish" goes to all; so it is in informations for riots. And by ASTRY, *clerk of the crown*, it is always so in *significavits.—Tamen quære.*

CURIA. If the defendant had pleaded below or here, that he had heard divine service in any other church, though not in his own parish, the penalties should not have went out; but being now incurred, there is no remedy; and the word "parish" goes to all preceding.

(a) 1. Show. 16. Salk. 224.

Prodgers *against* Frazier. Case 16.

TRESPASS.—The defendant pleaded, that before the time of the trespass supposed to be committed, *Bridget Dennis* was seised in fee of the lands in question, who by writ *de idiotâ inquirendo* was found to be AN IDIOT not having any lucid intervals *per spatium octo annorum, &c.* by virtue whereof the king was entitled; who granted the custody to *Sir Alexander Frazier*, who died, and that the defendant *Mary Frazier* was his executrix. The plaintiff replied, and confessed the idiotcy, but that the king granted the custody of the idiot to the plaintiff: and upon this replication the defendant demurred.

The king may grant the custody of *an idiot*, his lands and goods, to another, without security to account; but in the case of a *lunatic* the grantee must account.

In this case it was agreed by the counsel on both sides, that the king by his prerogative hath the sole interest in him of granting the estate of *an idiot* to whom he pleases without any account *(a)*; but it is otherwise in case of *a lunatic*; for there the grantee shall have nothing to his own use, but must put in security to account to the lunatic, if ever he come to be capable, or else to his executors or administrators *(b)*.

S. C. 1. Eq. Abr. 276. S. C. 1. Vern. 9. 137. S. C. 2. Ch. Cases, 70. S. C. 2. Show. 141. S. C. 3. Bac. Abr. 303.

Skin. 4. 139. 177. 4. Co. 127. Moor, 4. 1. And. 23. Bend. 17. Dyer, 25. 1. Vern. 9. Wright's Ten. 91.

(a) See 17. *Edw.* 2. c. 9.

(b) See Francis's Case, Moor, 4.; the case of Sheldon *v.* Fortescue, 3. Peer. Wms. 104.; Rochford *v.* the Earl of Ely, 6. Brown's Par. C. 329.; Kipp *v.* Palmer, 2. Wils. 130.

But

Inquisition of office, finding the party to be AN IDIOT *for the space of eight years* is good; for the latter words shall be rejected as *surplusage*.

Ley, 25.
4. Co. 127.
2. Show. 171.
9. Mod. 98.
1. Vern. 105.
155. 262.
2. Vern. 192.
414.
2. Stra. 915.
1104. 1208.
3. Bac. Abr.
79, 80.
1. Peer. Wms.
701.
2. Peer. Wms.
103.
3. Peer. Wms.
108. 389.
Prec. Ch. 203.
Dyer, 155. b.
261. b. 306. b.

But the questions that did arise in this case were;—FIRST, That there was not sufficient title found for the king; for by the inquisition the idiot was found to be so *per spatium octo annorum*, &c.; which is uncertain, because before that time she might have *lucida intervalla*, and then she cannot be an idiot * without being naturally so; therefore the jury ought to have found her an idiot *à nativitate*, for that is the only matter which vests an interest in the king.

But it was answered and agreed by THE COURT, that the finding her to be *an idiot* was sufficient, without the addition of any other words, and therefore *per spatium octo annorum* shall be surplusage; for in this case words are not so much to be regarded as the reason of the law, which doth not allow of idiotcy otherwise than *à nativitate*. But supposing a seeming uncertainty in this office found, yet it being said generally, that she was *an idiot*, the subsequent words shall not hurt, because the general finding shall be taken in that sense which is most for the advantage of the king. As for example, it was found by office that a person died seised of two manors, and that he held one of the queen by *knight's service* generally, and the other of a mesne lord in *chivalry*, which is the same tenure; now it was held, that the first general finding shall be intended knight's service *in capite*, because it was most for the king's benefit, that he might thereby be entitled to the wardship of the heir, who was found to be under age.

The king's grant of the custody of an idiot passes an interest to the executor of the grantee.

Skin. 4. 139.
177.
1. Vern. 9. 11.
2. Ch. Cases, 70.
3. Com. Dig.
"Idiot" (c).
2. Show. 171.
3. Bac. Ab. 82.
Cases T.T. 143.
2. Peer Wms
103. 122. (628).

SECONDLY, Whether the grant of the custody of an idiot will pass any interest to the executor of the grantee, because such a grant carries a trust with it, and the king may have some knowledge and consideration of the grantee, but not of his executor?

To which it was answered, that here was an interest coupled with a trust, as in the case of wardship formerly, which always went to the executor of the grantee, and which was of greater consideration in the law than the feeding or clothing of an idiot.

And of that opinion was THE COURT, that the king had a good title to dispose of both the ward and the idiot; one till he was of age, and the other during his idiotcy.

Judgment for the defendant.

TRINITY

TRINITY TERM,

The Thirty-Sixth of Charles the Second,

IN

The King's Bench.

Sir George Jefferies, *Knt. Chief Justice.*
Sir Francis Wythens, *Knt.*
Sir Richard Holloway, *Knt.* } *Justices.*
Sir Thomas Walcot, *Knt.*
Sir Robert Sawyer, *Knt. Attorney General.*
Heneage Finch, *Esq. Solicitor General.*

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* Reeves *against* Winnington. Case 17.

THE TESTATOR was a citizen and freeman of *London*, and being seised in fee of a messuage, &c. and likewise possessed of a considerable personal estate, made his will, in which there was this clause: "I hear that *John Reeves* is enquiring after "my death, but I am resolved to give him nothing but what his "father hath given him by will. I give *all my estate* to my "wife, &c." A devise of "all "my *estate*" passes *a fee*. S. C. 2. Show. 249. S. C. 2. Eq. Abr. 299. Post. 105. Stiles, 281. 6. Mod. 106. 4. Mod. 89. 1. Roll. Abr. 835. 8. Mod. 109. 255. 1. Salk. 237. 2. Ld. Ray. 1324. 2. Burr. 880.

The question was, Whether by these words the devisee had an estate for *life* or *in fee* in the messuage?

It was argued, that she had only an estate for life, because the words "all my estate" cannot be construed to pass a fee, for it doth not appear what estate was intended; and words in a will which go to disinherit an heir, must be plain and apparent *(a)*.

2. Wils. Rep. 524. 3. Peer. Wms. 295. 1. Vezey, 226. 1. Wils. 333. 2. Peer Wms. 523. 3. Com. Dig. "Devise" (N. 4.). 2. Bac. Abr. 55. 2. Ld. Ray. 1325. 1. Ld. Ray. 187. Cowp. 299. Dougl. 734. 1. Term Rep. 411. 1. H. Bl. Rep. 225. 2. Term Rep. 656. Cases T. T. 110. 157. Prec. Ch. 37. 264. 471.

(*a*) See Denn *v.* Gaskin, Cowp. 661. that an heir at law cannot be disinherited by the plainest intention upon the face of the will, unless the estate is completely disposed of to somebody else.

A devise

A devise was in these words, "I give all to my mother, all to "my mother:" and it was adjudged that a fee did not pass, which is as strong a case as this; for by the word "all" it must be intended *all* that was in his power to give, which is as comprehensive as if he had said "all my estate *(a)*." It is true, it hath been adjudged that where a man devised his "whole estate" to his wife, paying his debts and legacies, that the word "estate" there passed a fee, because it was for the benefit of the creditors, there being not personal assets sufficient to pay all the debts *(b)*.
*[46] * But that is not found in this case; therefore the word "estate," being doubtful, and which will admit of a double construction, shall not be intended to pass a fee.

MR. POLLEXFEN *contra*. The first part of this sentence consists in negative words, and those which are subsequent explain the intention of the testator, *viz*. That *John Reeves* should take nothing by the will. The word "estate" doth comprehend the whole in which the owner hath either an interest or property, like a release of all actions, which is a good discharge as well of real as personal actions. In common understanding it carries an interest in the land, and then it is the same as if he had devised all his fee-simple estate. In the case of *Bowman v. Milbank (c)* it was adjudged, that a fee-simple did not pass by the particle *all*, because it was a relative word, and had no substantive joined with it; and therefore it might have been intended "all his cattle," "all his goods," or "all his personal estate," for which uncertainty it was held void; yet TWISDEN, *Justice*, in that case said, that it was adjudged, that if a man promise to give "half his estate" to his daughter in marriage, that the lands as well as the goods are included. The testator devised "all his tenant-right estate *(d)*" held of such a manor; and this being found specially, the question was, Whether any more passed than an estate for life, because he did not mention what estate he intended? But it was held that the devisee had a fee-simple, because the words were as comprehensive as if he had devised "all his inheritance," and by these words a fee-simple would pass.

See Hogan *v.* Jackson, Cowp. 306.

CURIA. It plainly appears, that the testator intended nothing for *John Reeves*, therefore he can take nothing by this will; that the devisee hath an estate in fee-simple, for the words "all "my estate" are sufficient to pass the same *(e)*.

(a) Bowman *v.* Milbank, 1. Sid. 191.

(b) Kerman *v.* Johnston, 1. Roll. Abr 834. Stiles, 221. Cro. Car. 447.

(c) 1. Sid. 191.

(d) Wilson *v.* Robinson. 1. Mod. 100. 2. Lev. 91. 3. Keb. 245 Post. 105 12. Mod. 594. 2. Eq. Abr. 299.

(e) See Hogan *v.* Jackson, Cowp. 306.; Loveacres *v.* Blight, Cowp. 352.; Den *v.* Gaskin, Cowp. 657 660.; Doe *v.* Davies, Dougl. 716.; Maundy *v.* Maunday, Dougl. 763.; Holdfast *v.* Martin, 1. Term Rep. 411.; Fletcher *v.* Smiton, 2. Term Rep. 656.; Palmer *v.* Richards, 3. Term Rep. 356. 360.; Beerley *v.* woodhouse, 4. TermRep. 89.; Dally *v* King, 1. H. Bl. Rep. 3.; Tanner *v.* Wise, 3. Peer. Wms. 295.

Raw

* The King *against* Sir Thomas Armstrong. Case 18.

Saturday, June 14th, 1684.

THE DEFENDANT was outlawed for high-treason, and being taken at *Leyden*, in *Holland*, was brought into *England*.

Being now at the bar, he desired that he might have leave of the Court to reverse the outlawry, and be tried by virtue of the statute of 5. & 6. *Edw.* 6. c. 11. which enacts, "That if the "party outlawed shall, within one year next after the said outlawry "pronounced, or judgment given upon the said outlawry, *yield* "himself to the Chief Justice of *England* for the time being, and "offer to traverse the indictment or appeal whereupon he was "outlawed, that then he shall be received to the said traverse; "and being thereupon found *not guilty*, he shall be acquitted and "discharged of the outlawry, and of all penalties and forfeitures "by reason of the same, in as large and ample manner and form "as though no such outlawry had been made."

Outlaws who are *apprehended* abroad may surrender to THE CHIEF JUSTICE in pursuance of 5. & 6. *Edw.* 6. c. 11. within the year, notwithstanding their being in custody.

S. C. Skin. 195. S. C. 3. St. Tr. 983. S. C. 8. St. Tr. 454. Ante, 42. Post. 72. Dyer, 287. 3. Inst. 32. 10. Mod. 357. 380. 409. Stra. 824. 1. Burr. 638. 5. Com. Dig. 652. 3. Bac. Abr. 777.

The defendant alledged, that it was not *a year* since he was outlawed, and therefore desired the benefit of this law.

But it was denied, because he had not rendered himself according to the statute, but was apprehended and brought before the Chief Justice (*a*).

Whereupon *a rule* was made for his execution at *Tyburn* (*b*); which was done accordingly.

(*a*) S. C. Skin. 195. says, "This "seems to be a case of the first instance, "*et durus sermo.*" And it appears, S. C. 3. State Trials, 983. that *Sir George Jefferies* was the Chief Justice. THE PRISONER requested to have Counsel assigned him to argue the point *of law*, Whether, as he was outlawed while absent from this kingdom, and prevented from *yielding* himself by being *apprehended* while abroad, he was not now at liberty to surrender, the year not being expired? But *Jefferies* refused this request, because there was not, as he said, any doubt or difficulty in the case, S. C. 3. St. Tr. 984. In the case, however, of *Roger Johnston*, who was apprehended on an *escape warrant* for an escape from custody on a *capias utlagatum* for high treason in diminishing the coin, on being brought to the bar of the king's bench on *habeas corpus*, he offered to surrender himself pursuant to the above statute of 5. & 6. *Edw.* 6. c. 11. and RAYMOND, *Chief Justice*, was of opinion, that he could not refuse to accept of his surrender, Mich. 2. *Geo.* 2. Foster's C. L. 46. although it was not a voluntary surrender, but a compulsory reception; for it would be very hard, when the statute had given a man *a year* to come in, that by taking him up before the year was out, the benefit of the law should be taken from him, S. C. 2. Stra. 824. The Counsel for the Crown ventured to mention, but did not much insist on, the above case of *Sir Thomas Armstrong*; but the Court seemed very unwilling to hear any thing of that case, Stra. 824.: and in the Notes to Mr. Hargrave's edition of the State Trials it is said, that "*Armstrong's Case* was "declared a precedent not fit to be fol"lowed." 3. State Trials, 984. *notis.*

(*b*) But see the case of Rex *v.* Athoes, that where a felon is in the custody of THE MARSHAL of the king's bench, and the Court passes sentence of death, the execution of the sentence shall be at the place called *St. Thomas a Waterings*, near *Kent street*; and that this is the usual place of execution for his prisoners, 1. Strange, 553.: see also the case of John Royce, 4. Burr. 2086.; and 2. Hawk. P. C. ch. 51. s. 1. *notis.*

MICHAELMAS TERM,

The Thirty-Sixth of Charles the Second,

IN

The King's Bench.

Sir George Jefferies, *Knt. Chief Justice.*

Sir Francis Wythens, *Knt.*
Sir Richard Holloway, *Knt.* } *Justices.*
Sir Thomas Walcot, *Knt.*

Sir Robert Sawyer, *Knt. Attorney General.*
Heneage Finch, *Esq. Solicitor General.*

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*[48]
Case 19.

* Hebblethwaite *against* Palmes.

Michaelmas Term, 36. Car. 2. Roll 448.

In an action on the case for diverting a water-course, a declaration that the defendant broke down an ancient dam, by which he did divert the water-course *ab antiquo et solito cursu, erga* the plaintiff's mill, is good on *demurrer*, although it do not state it to be an *ancient mill*, or shew any other title than *possession* to the water-course, or that the defendant was bound to sustain *the dam*; for possession is a sufficient title against a wrong-doer, and the word *solito* implies antiquity.—S. C. 3. Lev. 133. S. C. Carth. 84. S. C. Comb. 9. S. C. Skin. 65. 175. S. C. 1. Show. 64. S. C. 2. Show. 243. 249. S. C. Holt, 5. 8. Co. 87. Cro. Eliz. 169. 1. Lev. 12. 273. 8. Mod. 272. 10. Mod. 25. 11. Mod. 257. 219. 12. Mod. 100. 151. 215. Salk. 459. Cro. Car. 500. 575. Skin. 316. 3. Lev. 73. 1. Ld. Ray. 248. 266. 274. 488. 494. 2. Ld. Ray. 713. 1091. 1399. 2. Stra. 1238. 1004. 1. Burr. 440. 444. 5. Com. Dig. "Pleader" (C. 39.). 4. Bac. Abr. 15. 113. 1. Term Rep. 428. 431. 1. Wilf. 326. 2. Term Rep. 147. 4. Term Rep. 318. 718.

AN ACTION ON THE CASE was brought in the common pleas, for diverting of a water-course. The declaration was, That the defendant, on the *first* of *August*, &c. unlawfully and maliciously did break down an ancient dam upon the river *Darwent*, by which he did divert *magnam partem aquæ ab antiquo et solito cursu erga molendinum ipsius quer. &c. ad damnum*, &c.—THE DEFENDANT *pleaded*, that before the said breach made, he was seised in fee of an ancient mill, and of six acres of land adjoining, upon which the said dam was erected, time out of mind, to turn the water to his said mill, which dam was always repaired and maintained by the defendant, and the tenants of the said land; that his mill was casually burnt, and he not intending to rebuild it, suffered the dam to be broken down, and converted the timber to his own use, being upon his own soil, *prout ei bene licuit*, &c.—

HEBBLETHWAITE *against* PALMES.

THE PLAINTIFF *replied*, that by the breaking of the dam the water was diverted from his mill, &c.—THE DEFENDANT *rejoined*, and juſtified his plea, and traverſed that the mill of the plaintiff was an ancient mill.—And upon *a demurrer* to this rejoinder, judgment was given for the plaintiff.

A WRIT OF ERROR was now brought to reverſe that judgment.

For the defendant in the action it was argued—FIRST, That the declaration is not good, becauſe the plaintiff had not ſet forth that his mill was an *ancient mill.*

[49] * SECONDLY, Becauſe he had not entitled himſelf to the water-courſe.

THIRDLY, That the plea was good in bar to this action, becauſe the defendant had ſufficiently juſtified having a right to the land upon which the dam was erected, and always repaired it.

As to THE FIRST POINT, it hath been the conſtant courſe for many years in ſuch actions, to ſet forth the antiquity of the thing, either in expreſs terms, or in words which amount to it. In 8. *Eliz.* ſuch an action was brought, *quòd defendens divertit multum aquæ curſum per levationem et conſtructionem waræ, &c. per quod multum aquæ quæ ad molendinum* (of the plaintiff) *currere conſuevit è contra recurrit (a).* Which word "*conſuevit*" doth imply, that it was an ancient mill, for otherwiſe the water could not be accuſtomed to run to it. In the twenty-fifth of *Elizabeth* the like action was brought, wherein the plaintiff declared, *quòd cùm molendinum quoddam ab antiquo fuit erectum*, whereof he was ſeiſed, and the defendant erected a new mill *per quod curſus aquæ præd. coarctatus fuit (b).* And eighteen years afterwards was *Lutterell's Caſe (c)* in this court, wherein the plaintiff ſhewed that he was ſeiſed of two old and ruinous fulling-mills, and that time out of mind, *magna pars aquæ cujuſdam rivoli* did run from a certain place to the ſaid mills; and that during all that time there had been a certain bank to keep the current of the ſaid water within its bounds, &c. That the plaintiff did pull down thoſe old mills and erected two new mills, and the defendant digged down the bank, &c. The like action happened in the fourteenth year of *Charles the Firſt*; it was for diverting an ancient water-courſe, *qui currere conſueviſſet et debuiſſet* to the plaintiff's mill (*d*). In all which caſes, though there are various ways of declaring, yet they all ſhew that the conſtant courſe was to alledge that the mills were *ancient*; for it is that which entitles the party to his action (*e*). It is for this reaſon alſo, that if two men have contiguous houſes, and one ſtop the other's lights, if they are not *ancient*, an action will not lie for ſtopping of them up. There may be ſome ſeem-

(*a*) Dyer, 248.
(*b*) Ruſſel *v.* Handford, 1. Leon. 273.
(*c*) 4. Co. 86.
(*d*) Cro. Car. 499. Palm. 290.
(*e*) 1. Roll. Abr. 107.

ing

ing difference between a right to a watercourſe, and to lights in a window; for no man can preſcribe to light *quatenus* ſuch, becauſe it is of common right to all men, and cannot be claimed but as affixed to a particular thing or purpoſe. A *watercourſe* may be claimed to ſeveral purpoſes, but *water* is of as univerſal uſe and benefit to mankind as *light*; * and therefore no particular man [50] hath a right to either, but as belonging to an ancient houſe, or running to an ancient mill, or for ſome other ancient uſe. In the fifteenth of *Charles the Firſt*, the plaintiff *Sands* (*a*) declared, that he was ſeiſed in fee of a mill, and had a watercourſe running through the defendant's lands to the ſaid mill, and that he ſtopped it up; there was a demurrer to this declaration, and the ſame objection as now was then taken to it, *viz.* that he had not ſhewed that it was an *ancient mill*; and though the Court ſeemed to overrule that objection, yet no judgment was given. The caſe of *Sly v. Mordant* (*b*) was there cited (which is reported by *Mr. Leonard*), and is this, *viz.* That the plaintiff was ſeiſed in fee of certain lands, &c. and the defendant had ſtopped a watercourſe, by which his land was drowned; and it was adjudged that the action would lie for this injury; but that is no authority to ſupport this declaration.

SECONDLY, The plaintiff hath not entitled himſelf to this watercourſe, either by preſcription, or that the water *debuit vel conſuevit currere* to his mill; for ſo is the pleading in *Lutterell's Caſe*, and in all the other caſes before cited.

THIRDLY, Therefore the plea in bar is good; the defendant having ſufficiently juſtified his right, and the plaintiff having not preſcribed to it, here can be no treſpaſs done. And ſo concluded that judgment ought to be reverſed.

For the plaintiff in the action. This caſe depends upon the declaration; for the plea in bar is only argumentative; it is no direct anſwer to it; and the replication and rejoinder are not material. The plaintiff has a good cauſe of action; for it cannot be denied, but where an injury is done to another, and damages enſue, it is ſufficient to maintain an action of treſpaſs, or upon the caſe. It is plain, that an injury was done to the plaintiff, and the damage is as manifeſt, by diverting of the watercourſe, and the loſs of his mill; and the fact is laid to be *injuſtè et malitioſè*. The defendant gives no reaſon why he injured him, but only that he had no uſe of the water, becauſe his mill was burnt. This is an action brought by the plaintiff upon his *poſſeſſion* againſt a *wrong-doer*, in which it is not neceſſary to be ſo particular, as where one preſcribes for a right (*c*). A man may have a watercourſe by grant as well as by preſcription (*d*), and in ſuch caſe he need not ſet

(*a*) Sands v. Trefuſe, Cro. Car. 575. See the caſe of Villers v. Ball, 1. Show. 7.; Clarke v. King, 3. Term Rep. 147. See alſo 5. Com. Dig. "Pleader," c. 39. 1. Ld. Ray. 392. 2. Ld. Ray. 1538.

(*b*) 1. Leon. 247. 1. Roll. Abr. 104.

(*c*) 1. Roll. Rep. 339. 394. Palm. 290 See 5. Com. Dig. 347. 1. Burr. 440.

(*d*) Bracton lib. 4. cap. 32.

forth

HEBBLETHWAITE *against* PALMES.

forth any particular * use of the water, as that it ought to run to his mill; neither is it absolutely necessary to mention the mill; for that is only to inform the Court of the damages. In the printed entries (*a*) there are many forms of declarations, without any prescription, or setting forth that the mill was ancient; as where an action was brought against the defendant, *de placito quare vi et armis stagnum molendini ipsius* (the plaintiff) *fregit*, and this was only upon the possession (*b*). The case in *Dyer* is a good authority to support this action; for it is as general as this, *viz.* for diverting a watercourse, *per constructionem wera*, and doth not shew where it was erected, or what title he had to it. So where the action was for disturbing the plaintiff in collecting of toll (*c*), and doth not shew what title he had to it, either by *prescription* or grant; but declared only, that he was seised in fee of a manor and fair, and held good. And it was the opinion of my LORD HOBART, that a declaration for breaking down of a bank generally *includentem aquam* running to the plaintiff's mill, was good (*d*). The authorities cited on the other side rather maintain this way of pleading than the contrary; for those cases are wherein the plaintiff declared, that the water *currere consuevit et debuisset* to the plaintiff's mill, time out of mind; which words are of the same signification as if he had shewed it to be an antient mill; and that agrees in substance with this case, for the water cannot be diverted *ab antiquo et solito cursu*, if the mill was not ancient (*e*). The word *solet* implies antiquity (*f*): the writ *de sectâ ad molendinum* is "*quam ad illud facere debet et solet*:" and it was the opinion of a learned Judge (*g*), that the words *currere consuevit et solebat* did supply a prescription or custom. Thus it was in an assise of nusance, wherein the plaintiff set forth, that he had a fountain of water *currentem usque ad rotam molendini, &c.* and that the defendant *divertit cursum aquæ*, and this was held good (*h*). The cases of stopping up of lights and diverting of watercourses are not parallel. The prescription to lights must be *ratione loci*; and therefore if a man will erect a new house, and a stranger will stop the lights, it is an injury done, and the action may be maintained upon the possession (*i*). *Lutterel's case* (*k*) was grounded upon

*[52] the possession; for upon the plaintiff *Cottel's* own shewing the

10. Mod. 158. 229. 300. 11. Mod. 158. 12. Mod. 35. Gilb. Eq. Rep. 283. 2. Stra. 909.

prescription was gone; because he set forth, that he had pulled down the old mills, and * that the defendant *Lutterel* diverted the water from running to those mills which the plaintiff newly built. All which prove, that a prescription goes to the right, but a possession is sufficient to support an action against a *tort feasor*. Lastly, in the case of *a common* or *a rent*, which cannot pass without

(*a*) Rastal's Ent. 9.
(*b*) Ante.
(*c*) Dent v. Oliver, Cro. Jac. 43. *Sed nota*, This was after verdict.
(*d*) Bicot v. Ward, Hob. 193.
(*e*) Cro. Car. 499.
(*f*) Register, 153.
(*g*) DODDERIDGE, *Justice*, in the case of Surry v. Piggot, Poph. 171.
(*h*) 27. Assize, placito 8. Brook's Abr. "Prescription," 49. Rastal's Entries, "Nusance."
(*i*) 1. Show. 7.
(*k*) 4. Co. 86.

deed (*a*), if the plaintiff ſhew a *que eſtate*, he muſt produce the deed (*b*) by which it was granted; but where he preſcribes for *a way*, he may ſet forth his eſtate without ſhewing how he came by it, becauſe it is but a conveyance to the action, which is grounded upon the diſturbance done to the poſſeſſion.

HERBLETHWAITE *against* PALMER.

2. Vern. 390.

THE COURT. The word "*ſolet*" implies antiquity, and will amount to a preſcription; and *ſolitus curſus aquæ* running to a mill, make the mill to be ancient; for if it were newly erected, there cannot be *ſolitus curſus aquæ* towards that mill.

For which reaſons the judgment in the original action was affirmed in *Hilary Term*, in the firſt year of *William* and *Mary*.

But THE CHIEF JUSTICE was of opinion, that if the cauſe had been tried upon ſuch a declaration, the plaintiff ought to have proved his *preſcription*, or elſe he muſt be nonſuited.

See the caſe of Dorn *v* Gaſhford, Comyn Rep. 44.

(*a*) Slackman *v*. Weſt, Palm. 387. Cro. Jac. 673. Yelv. 201. 2. Mod. 277.

(*b*) But ſee 16. & 17. *Car*. 2. c. 8.; the 4. & 5. *Ann*. c. 16. 1. Sid. 249. Lut. 1353. 1. Salk. 497. 6. Mod. 135.

Anonymous.

Caſe 20.

ONE was indicted for the drinking of an health to the pious memory of *Stephen College*, who was executed at *Oxford* for high treaſon. He was fined one thouſand pounds, and had ſentence to ſtand in the pillory, and was ordered to find ſureties for his good behaviour.

Drinking to the pious memory of a perſon executed for high treaſon, is a *contempt* of the king and his government.—5. Mod. 363. 1. Hawk. P. C. 92.

*[53]

The King *againſt* Roſewell.

Caſe 21.

THE DEFENDANT was a non-conformiſt miniſter, and indicted for high treaſon in preaching of theſe words, "Why do "the people" (*innuendo* the people of *England*) make a flock-"ing to the king" (*innuendo Carolum Secundum*), under pre-"tence of curing the king's evil, which the king cannot do? "But we are the prieſts and prophets to whom they ought to "flock, who by our prayers can heal them. We have had two "wicked kings now together" (*innuendo Carolum Primum et Carolum Secundum*) "who have ſuffered popery to be introduced "under their noſes, whom I can liken to none but wicked *Je-"roboam*; and if they," *innuendo* the people *, *&c*. "would ſtand "to their principles, I make no doubt but to conquer our enemies," *innuendo*, the king and all his loyal ſubjects, "with rams horns, "broken pitchers, and a ſtone in a fling, as in the time of old."

Upon this indictment he was arraigned, and pleaded *not guilty*, and was tried at bar, and found *guilty* of HIGH TREASON upon

An indictment for Treaſon, for *ſaying*, "We "have had two "wicked "kings," INNUENDO *Charles the Firſt and Charles the Second*; "but "if they," INNUENDO *the people*, "would ſtand "to their principles, we "ſhould conquer our "enemies," INNUENDO *the king and his loyal ſubjects*, is bad; for an *innuendo* cannot determine the ſenſe of words.—S. C. 2. Show. 411. S. C. 3. State Trials, 909. S. C. 6. State Trials. App. 48. 1. Roll. 185. Cro. Car. 117. 1. Lev. 57. Comyns, 43. 10. Mod. 197. 11. Mod. 99 1. Hale, 115. 2. Hawk. P. C. 57. 4. Hawk. P. C. 323. Ld. Ray. 879. Cowp. 276. 1. Term Rep. 70.

 the

THE KING *against* ROSEWELL.

the evidence of two women. And the Court having affigned MR. WALLOP, MR. POLLEXFEN, and MR. BAMPFEILD to be his counfel, they moved in arreft of judgment:

FIRST, That the words, difcharged of the *innuendoes*, if taken feparate, or all together, have no tendency to treafon. The firft paragraph does not import any crime; and to fay that "we have "had two wicked kings," may be a *mifdemeanor*, but it is not *treafon*, either by intendment of the death of the king, or by levying war againft him. The crime feems to confift in the next words, which are, "if they would ftand to their principles, &c.;" this feems to ftir up the people to rebellion, but as they are placed in the indictment, they will not admit of fuch a conftruction, neither as they have reference to the words precedent, or as they ftand by themfelves. The words which go before are, *viz.* "we have "had two wicked kings together." It is not expreffed what kings, or when they reigned, which is very uncertain; "*et fi ipfi ad fundamentalia fua ftarent*," which word *ipfi* is relative, and muft refer *ad proximum antecedens*, and then it muft be "*ipfi reges*" which is the proper and natural fenfe of the words. But now if the *innuendoes* muft be inferted, it muft be under fome authority of law, either to defign the perfon or the thing, which was not certain before, that the intention of the party fpeaking may be more eafily collected; and this is the moft proper office of an *innuendo* (*a*). It will not change the meaning of the words, for that is to make them ftill more uncertain (*b*). Now moft of the *innuendoes* in this indictment are naught, becaufe they do not afcertain the fubject matter. Firft, by the word "people," *innuendo* the people of *England*, may be as well intended any other people, becaufe there was no previous difcourfe of the people of *England*. Then follow thefe words, "we have had two wicked kings now "together," *innuendo King Charles the Firft and Second*, which be as well intended of *King Ethelred* and *Alfred*, becaufe the words denote a time paft, and therefore cannot poffibly intend
[54] the king, of whom there was no precedent * difcourfe. And the rule is, *de dubiis et generalibus benignior fententia recipienda eft*. Befides, thofe words are infenfible, and indeed impoffible, for we cannot have two wicked kings *together*, it ought to be *fucceffively*. Then to fay, "We fhall conquer our enemies," cannot be intended the enemies of the king, becaufe the word "enemies" is of a large fenfe; for man, by reafon of his fins and infirmities, hath many enemies, and poffibly fuch might be intended. If therefore it be doubtful what enemies were meant; if it fhall not be in the power of a clerk by an *innuendo* to make words of another fenfe than what they will naturally bear, nor to help where they are infenfible, as in this cafe; if there was no precedent difcourfe, either of kings, people, or enemies, which muft be proved by the evidence; then is this indictment naught. And therefore judgment ought to be arrefted.

(*a*) 4 Co. 17. (*b*) Hob. 45. Cro. Jac. 126.

MR.

The King against Rosewell.

Mr. Attorney and Mr. Solicitor *contra*. It is said in this indictment, that the words were spoken to stir up rebellion, and to depose the king; and it is so found by the verdict of twelve men. That which aggravates the offence is, that it was spoken in a public assembly to *the people*, which must be intended *the people of England*, for to such the defendant preached, and to them he declared the power given unto him by God to heal them by prayer. Then he tells them, that their king is wicked; and having insinuated this doctrine into their minds, he then bids them stand to their principles in opposing and subduing wicked kings. It is objected, that there ought to have been a precedent discourse of the king; but the precedents are otherwise. In the reign of *Henry the Eighth* (*a*), there was an indictment against the *Lord Grey*, for words spoken against the king, without setting forth any precedent discourse of him. So was my *Lord Cobham's Case*, in 12. *Jac.* 1. for that he "*proditoriè dixit* "*et propalavit hæc verba*, viz. "It will never be well for "*England* until the king and his cubs are killed," without an averment that the words were spoken *de rege*. And in *Williams' Case* (*b*), who was indicted for high treason, for writing two books in which were many traitorous assertions, but no averment of any previous discourse concerning the king; all these indictments were thus, *viz.* "*dixit*" such words "*de domino rege.*" *Therefore the indictment is good in form, if the words therein contained amount to treason. Now do they import treason or not? If they do import it, then it is unnecessary to aver that they were spoken *de rege*, because it cannot be intended to be treason against any other king. If a man should say, that "he would go to "*Whitehall* and kill the king," it is not necessary to aver any precedent discourse *de rege*. In actions on the case for words there must be an averment *of* the person, because many men are of the same name; but in indictments the form will govern the case. Several traitors have suffered death in such cases as this at bar, and many learned men in all ages have attended this court, and this objection was never made till now; and therefore the precedents being without this averment *de rege*, where the overt act is by words, judgment was prayed against the prisoner.

*[55]

See Croghan's Case as reported Cro. Car. 332. and Mr. Justice Foster's discourse upon it, Fost. C. L. 203.

Curia. *Words* may be an *overt act*, but then they must be so certain and positive as plainly to denote the *intention* of the speaker. If a man should tell another that he would drive the king out of *England*, there needs no averment that such words were spoken *de rege*, because they tend immediately to depose the king; but if he had said, that he would go to

(*a*) See Year Book 33. *Hen.* 8. 17.

(*b*) Reported by Lord Roll, 2. Roll. Rep. 88.

Whitehall

THE KING *against* ROSEWELL.

Whitehall and destroy his enemies, that is not treason without an averment (*a*), &c.

Judgment was arrested.

(*a*) This doctrine is supported by many authorities: Staund. P. C. 2. Yelv. 107. Kely. 13. 2. Mod. 55. Alcock's Case, 1 Lev. 57. 1. Hawk. P. C. 40. Owen's Case, 1. Roll. Rep. 185. Lowick's Case, 4. State Trials, 723.—*Sir Edward Coke* and *Sir Matthew Hale* insist generally, that the bare *speaking* of words can never be an overt act of compassing or imagining the king's death; 3. Inst. 14. 35. 140. 1. Hale P. C. 111. 112.; but *Mr. Justice Foster* says, that the rule, which has been laid down on more occasions than one since the R[illegible] that loose words [illegible] *ding* are not overt acts of treason, 4. State Trials, 581. 645. Salk. 631.; but that words of advice or persuasion, and all consultations for the traitorous purposes of compassing the king's death, are certainly so: they are uttered in contemplation of some traitorous purpose actually on foot or intended, and in *prosecution* of it. Foster, 1 Disc. 200. It seems also to be the better opinion, that to make *writing* an overt act of high treason in compassing the king's death, it must not only be *published*, but clearly *import* a traitorous design upon the life of the king. 1. Hale, 118. Foster, 198. 1. Hawk. P. C. 33.

HILARY TERM,

The Thirty-Sixth of Charles the Second,

IN

The King's Bench.

Sir George Jefferies, *Knt. Chief Justice.*

Sir Francis Wythens, *Knt.*
Sir Richard Holloway, *Knt.* } *Justices.*
Sir Thomas Walcot, *Knt.*

Sir Robert Sawyer, *Knt. Attorney General.*
Sir Heneage Finch, *Knt. Solicitor General.*

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* Pool *against* Trumbal. Case 22.

A general pardon of "all offences" does not discharge a suit for *dilapidations.*

THE DEFENDANT was sued in the spiritual court for dilapidations, and pleaded the general pardon *(a)* by which "all offences, contempts, penalties, &c." were pardoned; and for this reason he prayed a prohibition: but it was denied, because the statute never intended to pardon any satisfaction for damages, but only to take away temporal punishments.

S. C. 2. Show. 420 Post. 241. 5. Co. 51. Cro. Car. 357. 1. Salk. 383. 4. Mod. 103. Fitzg. 107. 306. 11. Mod. 235. 1. Peer. Wms. 696. 1. Stra. 473 529. 2. Stra. 912. 1272. 1. Ld. Ray. 215.

(a) 25. *Car.* 2. c. 5.

Dorrington *against* Edwin. Case 23.

Michaelmas Term, 36. *Car.* 2. *Roll* 277.

In replevin, if the proceedings are by plaint, and the defendant, after removal by *certiorari*, obtains judgment, he may proceed by *scire facias* against the pledges. —S. C. Comb. 1. S. C. Skin. 244. S. C. 2. Show. 421. 485. Co. Lit. 145. 2. Inst. 140. Dalt. 440. Cro. Car. 446. Thea. Brev. 274. 5. Com. Dig. "Pleader" (3. K. 7.). 2. Bl. Rep. 1220. Bull. N. P. 60. Gilb. Replevins, 68. 177. 1. Ld. Ray. 278. 8. Mod. 323. 12. Mod. 352. 428. 453. Fitzg. 294. 2. Barnes, 346.

SCIRE FACIAS against pledges in a *replevin* brought by *pleint*, setting forth, That *John Temple* did levy a pleint in the sheriff's court of *London*, for the taking of three bags of money, in which

Dorrington against Lunn.

suit he found pledges *de prosequendo et de retorno habendo*, if it should be awarded; that this pleint was transmitted out of that court into the *Hustings*, and by "*certiorari (a)*" removed into the *King's Bench*, where the plaintiff declared as aforesaid, &c. *Dorrington* avowed the taking, &c. and *Temple* was nonsuited; and thereupon a *retorno habendo* was awarded to the sheriff, who returned *elongatus*, &c. Then a *scire facias* was brought against the pledges upon the statute of *Westminster the Second*, 13. *Edw.* 1. c. 2. which provides, that where "lords upon replevins cannot "obtain justice in inferior courts against their tenants, when "such lords are attached at their tenant's suits, they * may have "a *recordari* to remove the plea before the justices, &c. and the "sheriff shall not only take pledges of the plaintiff to prosecute "his suit, but also to return the cattle if a return be awarded, &c." The defendants appeared and prayed *oyer* of the *certiorari*, which was returned by the *mayor* and *sheriffs* only without the *aldermen*.

*[57]

The question upon a *demurrer* was, Whether a *scire facias* will lie against them by virtue of this statute, they being only pledges in *replevin* brought by pleint without writ?

Mr. Pollexfen *for the defendants* said, that they could not be charged by this *scire facias*, because the pleint was removed by *certiorari*, and thereby the plaintiff *Dorrington* had lost the benefit he had against the pledges in the sheriff's court. This case was compared to other actions in inferior courts, which if removed by *habeas corpus*, the bail below are discharged of course. By the common law there were no pledges of *retorn. habend.* (*b*) for before this statute the sheriff could not make a *replevin* without the king's writ: now he hath power to take pledges; but if he will make deliverance of the goods *ad querelam alicujus sine brevi*, the fault is still in him; for he may compel the party to bring a writ (*c*), and then the pledges will be liable, because it will appear who they are. And therefore it hath been adjudged (*d*), that where a *replevin* is brought by writ, the sheriff cannot make deliverance without taking pledges, because if the plaintiff should recover, he hath a remedy against them by *scire facias*; but if he recover upon a *replevin* brought by pleint, the judgment shall not be avoided by assigning the want of pledges for error (*e*), because in such case the sheriff is not by law obliged to take pledges (*f*).

See Tidd's Practice, 172.; and the 19. Geo. 3. c. 70. s. 6.

Secondly, This *scire facias* is brought too soon, for there ought to go an *alias et pluries retorn. habend.* before the return

(*a*) If it had not been a court of record it might have been removed by *Re fa lo.*—Dalt. 425. 9. Hob. 6. 58. F. N. B. 74 F. Dalt. 273. *Note to* Former Edition.

(*b*) Dyer, 246.

(*c*) Dalton, 434.

(*d*) Cro. Car. 446.

(*e*) Cro. Car. 594.

(*f*) Besides these pledges, the statute of 11. *Geo.* 2. c. 19. orders the sheriff to take a bond with two sureties in a sum double the value of the goods distrained, which bond may be assigned to the defendant, and, if forfeited, may be sued in the name of the assignee.

of

of *elongata*, and then, and not before, the *scire facias* is properly brought. Dorrington *against* Erwin.

E contra. The pledges are answerable, and the *scire facias* is well brought, and this grounded upon the statute of *Westminster the Second*, which directs pledges to be taken before the delivery of the goods: it * takes notice that *replevins* were sued in inferior courts by the tenants against their lords, who had distrained for rents due for services or customs; and that such lords could not have justice done in those courts; and therefore to remedy this mischief the statute gives the writ *recordare, &c.* to remove the pleint before the Justices; and because such tenants, after they had replevied their cattle, did usually sell them, so that a *retorn.* could not be made to the party distraining, therefore it directs that the sheriff shall take pledges for returning the beasts, if a return should be awarded, which would be to little purpose if such pledges were not liable upon the return of *elongat.* Now as to the removing of the pleint by *certiorari*, that makes the case more strong in the plaintiff's behalf, because the record itself *unà cum omnibus ea tangen.* is removed; but by an *habeas corpus* the person is only removed, and the Court hath thereby a jurisdiction over his cause, which the inferior court hath lost, because it hath lost his person.

*[58]

Skin. 244.

Secondly, This *scire facias* is not brought too soon, as hath been objected, for it is in vain to bring an *alias et pluries* after the sheriff had returned *elongat.*; it is like the common case where a *scire facias* is brought against the bail and *non est inventus* is returned, after which there never was an *alias* or *pluries capias*.

And afterwards, in *Michaelmas Term* following, judgment was given that *the pledges* are liable.

Palmer *against* Allicock. Case 24.

Michaelmas Term, 35. Car. 2. Roll 239.

PROHIBITION.—By the statute of 22. & 23. *Car.* 2. c. 10. for the distribution of intestates estates, it is provided, "That in "case there be no wife, then the estate of the husband dying intes- "tate shall be distributed equally among the children; and if no "child, then to the next of kin of the intestate in equal degree, "and to those who legally represent them."

If a man die intestate, leaving two sons, a moiety of his personal estate immediately *vests* in each of them by the statute of 22. & 23. *Car.* 2. c. 10.; and therefore if one die intestate before distribution made, his share shall go to his administrator, and not to the administrator of his father; for the statute *vests* the shares in those who are intitled to distribution at the time the intestate died.—S. C. Skin. 212. 218. S. C. Comb. 14. S. C. 2. Show. 407. 486. 2. Vern. [illegible] 550. 1. Vern. 403. 2. Bac. Abr. 386. 429. 1. Com. Dig. 235. Carth. 51. 1. Peer. Wms. 46. Prec. in Ch. 21. 28. Cases T. T. 251. 276. 2. Peer. Wms. 383. 440. 3. Peer. Wms 23. 40. 50. 102. 125. 194. Comyns, 3. 87. Stra. 710. 820. 865. 947. 10. Mod. 21. 276. 335. 389. 442. 12. Mod. 436. 615. 622. 410. 566. 619. Gilb. Eq. Rep. 92. 136. 189. Fitzg. 126. 285.

A man

PALMER *against* ALLICOCK.

A man died inteſtate having no wife at the time of his death, and but one child, who was an infant: afterwards adminiſtration was granted of the father's eſtate *durante minore ætate* of the child, who died before the age of ſeventeen. Then adminiſtration was granted by A PECULIAR to the next of kin of *the infant*; and an appeal was brought in THE ARCHES by the next of kin of *the father* to revoke that adminiſtration.

*[59] * The queſtion was, Whether adminiſtration *de bonis non*, &c. of the firſt inteſtate ſhall be granted to the next of kin of the father or the child?

MR. POLLEXFEN argued this Term for the plaintiff in the prohibition, That the ſtatute gives a power to the ordinary to take bonds of ſuch perſons to whom adminiſtration is committed, the forms of which bonds are expreſſed in the act, and the conditions are to make a true and perfect inventory, and to exhibit it into the regiſtry. He hath alſo a power to diſtribute what remains after debts, funeral charges, and expences. Thus the law ſtands now. Then as to the caſe at the bar three things are to be conſidered:

FIRST, If a man die inteſtate leaving two ſons and no wife, each hath a moiety of his perſonal eſtate immediately *veſted* in him, ſo that if one brother ſhould afterwards die inteſtate, the other ſhall have the whole.

SECONDLY, If an intereſt be veſted in two, then by this ſtatute the like intereſt is veſted in one, ſo that if he die inteſtate his adminiſtrator ſhall have the eſtate.

THIRDLY, If ſo, then the conſequence will be, that in this caſe adminiſtration *de bonis non* of the firſt inteſtate ſhall go to the next of kin of the infant.

By "intereſt" is meant a right to ſue for a ſhare after debts paid, which intereſt every perſon hath in a *choſe in action*: as if a man covenant with two, that they ſhall have ſuch an eſtate after debts paid, an intereſt veſts in them by this covenant, and if they die, it goes to their executors such alſo is the intereſt of every reſiduary legatee. Now if any of them die before the reſidue can be diſtributed, the wife or children of him ſo dying ſhall have it.

Ld. Ray. 86. 363. And to make this more clear, it will be neceſſary to conſider how the law ſtood before the making of this act. At the common law neither the wife, child, or next of kin, had any right to a ſhare of the inteſtate's eſtate, but the ordinary was to diſtribute it according to his conſcience to pious uſes, and ſometimes the wife and children might be amongſt the number of thoſe whom he appointed to receive it; but the law entruſted him with the ſole diſ-

*[60] poſition of it (*a*). * Afterward, by the ſtatute of *Weſtminſter the Second*, 13. *Edw.* 1. c. 19. he was bound to pay the inteſtate's debts ſo far as he had aſſets, which at the common law he was not

(*a*) 2. Inſt. 399.—See alſo Plowd. 277. Ld. Ray. 86. 363. 2. Bac. Abr. 399.

bound

PALMER against ALLICOCK.

bound to do; and an action of debt would then, and not before, lie against him, if he did alien the goods and not pay the debts (*a*).

Then the statute of 31. *Edw.* 3. c. 11. was made, by which he was impowered to grant administration to the *next of kin* and *most lawful friend* of the intestate; and by this statute the person to whom administration was committed, might have an action to recover the intestate's estate; for at the common law he had no remedy (*b*).

But then afterwards the statute of 21. *Hen.* 8. c. 5. enacts, "That the ordinary shall grant administration to *the widow* or "*next of kin* of the person deceased, or to *both*;" and this was the first law which gave any interest to the wife; to whom administration being once granted, the power of the ordinary was determined, and he could not repeal it at his pleasure, as he might at the common law (*c*). But after the making of this statute many mischiefs still remained, because the administration being once committed, the person to whom it was granted had the whole estate, and the rest of the relations of the deceased were undone; and therefore if his children were under age, or beyond the seas, and a stranger had got administration, it would have been a bar to them. And thus it continued many years, the ordinary still making distribution as he thought fit, taking only a bond from the person to whom he granted administration for the purposes aforesaid, and sometimes to dispose the surplus, after debts and legacies, as he should direct; and no prohibition was granted to remedy these inconveniencies till about the twelfth year of *King James the First* (*d*). But now by this act a good remedy is provided against these mischiefs; and it is such which takes away the causes thereof, which is, that the administrator shall not have the whole estate, but that a distribution shall be made. The title of the act shews the meaning thereof to be "for the better settlement of intestates "estates;" and the body of it shews how distribution shall be made; so that such bonds which were usually given by the administrator before this law to make distribution as the ordinary should direct are now taken away, and other forms are prescribed; and there can be no remedy taken upon such new bonds till the ordinary hath appointed the distribution; so that in effect this act makes the will of a person dying intestate, and tells what share his relations shall have: * and it is probable that the custom of *London* might guide the parliament in the making of this law; which custom distributes the estate of a freeman amongst his wife and children. This shews that an interest is vested in them, which goes to the administrator, the consequence whereof is very considerable; for if such children should marry, they have a security by this act that a portion shall be paid; and if the wife should take another

Ld. Ray. 86. 63.

* [61]

(*a*) Greifbrook *v.* Fox, Plowd. 277.
(*b*) Co. Lit. 133. b. 2. Inst. 397. and Hensloe's Case, 9. Co.
(*c*) Hob. 83. 1. Co. 62. 202.
(*d*) Hob. 83.

husband,

PALMER against ALLICOCK. husband, he will be entitled to her share; and this may be a means of giving credit in the world, when the certainty of their portions are so well known and secured. It is such an interest which is known in the law, and may be compared to that in *Sir Thomas Palmer's Case* (*a*), who sold sixteen hundred cord of wood to a man, who assigned it to another, and afterwards the vendor sold two thousand cord to one *Maynard*, to be taken at his election; the assignee of the first person cut six hundred cord, and *Maynard* carried it away; thereupon an action was brought, and the plaintiff had judgment, because the first vendee had an interest vested in him which he might well assign. This case is a plain proof that a man may have an interest in a chattel without a property, and such an interest which gives the person a remedy to recover; and where there is a remedy there must be a right, for they are convertibles. It is not a new thing in the law that a contingent interest in the ancestor shall survive to the heir; as if a man be seised of the manor of *S.* and covenant that when *B.* shall make a feoffment to him of the manor of *D.* then he will stand seised of the said manor of *S.* to the use of the covenantee and his heirs, who died leaving issue an heir, who was then an infant; *B.* made a feoffment to the covenantor accordingly; it was held, that no right descended to the heir of the covenantee, but only a possibility of an use, which might have vested in the ancestor, and therefore the heir shall claim it by descent (*b*). It is like a debt to be paid at a day to come, which is *debitum in præsenti*, though *solvendum in futuro*; and though the obligee cannot have an action before the day is come, yet such an interest is vested in him that he may release it before that day, and so bar himself for ever (*c*). Now if this act makes a will, it ought to be construed as such; and it cannot be denied, that if this case had happened upon a will, the executor of the son would have a very good title. It is a weak objection to affirm, that this law was made to establish the practice of the ecclesiastical courts, and that it is only explanatory of the statutes of *Edw.* 3. and *Hen.* 8. because it is * plainly introductory of a new law; for distribution is now made otherwise than it was before (*d*).

10. Mod. 165. 423. 12. Mod. 401. 455. 539. Gilb. Eq. Rep. 79. 1. Ld. Ray. 518. 2. Ld. Ray. 786. 1306.

[62]

(*a*) 5. Co. 24.

(*b*) See Wood's Case, cited in Shelley's Case, 1. Co. 99.

(*c*) Littleton, sect. 512. See also 9. Co. 37. 2. Inst. 398. Plowd. 277.

(*d*) It seems to be decided, by the case of Browne *v.* Shore, Easter Term, 1. *Will. & Mary*, 1. Show. 2. 25. that the statute 22. & 23. *Car.* 2. c. 10. *vests* the several shares of an intestate's effects in those who are intitled to distribution at the time the intestate died. Therefore where *A.* died intestate, and *B.* and *C.* were his next of kin, and *B.* died within a year after the intestate, and before any distribution actually made, it was held, that the executors of *B.* were intitled to *his* share of the intestate's effects. S. C. Comb 112. S. C. Holt, 258. 1. Vern. 403. 2. Vern. 274. But although each distributory share vests on the intestate's death, yet the same doth not so vest as to exclude a *posthumous child*. Edwards *v.* Freeman, 2. Peer. Wms. 441.—A man died intestate, leaving a widow and one son; afterwards the son died intestate; then the mother was delivered of a female child, whereof she was *enseint* at her husband's death; and it was decreed, that such *posthumous* daughter was intitled to a share of the son's personal estate. Wallis *v.* Hodson, Hilary Term 14. *Geo.* 2. *Note to* FOURTH EDITION.—See the report of this case, 2. Eq. Abr. 446. 637. 2. Atk. 115.

SECONDLY,

SECONDLY, An interest is vested where there is but one child. For the better understanding of this point the clause in the act ought to be considered, which is, *viz.* "If there be no wife, then "to be distributed amongst the children; if no child, then to the "next of kin of the intestate;" upon which clause these objections have been made.—FIRST, That it is insignificant, because the statute of 21. *Hen.* 8. c. 5. gives the right of administration to the child. —SECONDLY, That distribution cannot be made where there is but one.—THIRDLY, That this clause ought to be construed according to the law in the spiritual courts.—Now as to the first objection, it is true, that before this act the child had a right of administration, but that right was only personal; so that if he had died before he had administered, his executor or administrator could not have it. Besides, many inconveniences attended this personal right of administration, which are now prevented by the vesting of an interest. For when the right was personal, and the administrator gave bond with sureties to administer truly, and the ordinary had appointed distribution to be made, the administrator was bound to perform it, though not in equal degree; and if he died before the estate was got in, it was lost for ever. But now by this clause distribution must be made equally, *viz.* one third part of the surplus to the wife, the rest by equal portions to the children; so that what was very uncertain before, and almost at the will of the ordinary, is now reduced to a certainty; and therefore an interest must vest in such persons to whom such equal distributions of filial portions are given. As to THE OBJECTION, That distribution cannot be made where there is but one child; I answer, that this also is true in propriety of speech, and taking the word "distribute" in the strict sense. But this was never intended by the statute, as may plainly appear upon the construction of the whole; for the word "children" doth comprehend "a child" and more; and the form of the bond directed by this statute is, that the administrator shall deliver the goods to such person and persons, &c. which shews that one * is comprehended; and therefore *distribuere* in this case is no more than *tribuere*, and must be so taken. The parliament never intended that distribution should not be made where there is but one child, as may be easily collected from the reason of the thing and the inconveniences which would ensue.— FIRST, If a man should die leaving a wife and one child, the wife would be intitled to one third and the child to the other two thirds of the personal estate; now if the child shall have two thirds, being comprehended under the word "children," what reason can be given why he should not have the whole where there is no wife, which he could not have if the word "children did not comprehend "child" in this case?—SECONDLY, If a man hath a personal estate to the value of two thousand pounds, and die leaving issue three sons, but hath in his life-time made provision for the second son to the value of one thousand pounds; the eldest son dies intestate; shall the youngest be totally excluded from the remaining thousand pounds because there is none left to have distribution; his second

Quære, If a man die intestate, having no wife at the time of his death, and but one child, an infant, and administration be granted of the father's estate *durante minore ætate* of the child, and the child dies before it attains seventeen years of age whether administration *de bonis non* of the first intestate shall be granted to the next of kin of *the father*, or of *the child*?

Salk. 38.
2. Vern. 125. 634.
1. Stra. 552.
1. Ld. Ray. 86. 363. 571. 682.

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second brother being preferred in the life-time of his father by an equal portion with what remains?—THIRDLY, If the father hath a son married, and two brothers, and dies intestate, now if his estate should not be vested in the son, then if he should also die intestate, his wife could have nothing, but it would go to the uncles; and this would be a very hard construction of this law, to carry the estate to the uncles and their executors from the son and his administrator. But there is a case which proves that a child is intended by the word "children;" it is the case of *Amner v. Lodington* cited in *Matthew Manning's case (a)*, which was, A man being possessed of a term for years devised it to his wife for life, and after her death to her children unpreferred, and made her executrix, and died; she married again, and had but one daughter unpreferred; and after the death of the mother this executory devise was held good to the daughter, though it was by the name of *children*; and she enjoyed the term (*b*).

The statute of Distributions, 22.&23.*Car.* 2. c. 10 shall be expounded according to the common law.

THIRD OBJECTION, That this act should be construed according to the spiritual law.—I ANSWER, That cannot be, for all statutes ought to be expounded according to the rules of the common law, and not according to their law; for they have no law which gives power to sue, nor to distribute to the wife or next of kin, but the usual course was for the ordinary to dispose of intestates goods to pious uses. *[64] * Then admitting this to be an interest vested, the consequence will be, that it shall go to the administrator, and then administration must be granted where the estate legally ought to go. The administration of the husband to the goods of the wife is grounded upon this reason, because the marriage is *quasi* a gift to him in law (*c*). It was not the only mischief before this law that the administrator run away with the whole estate; for if a man died intestate leaving but one son then beyond sea, and administration was granted to a stranger, he who

8. Mod. 8. 10. Mod. 243. 359. 412. 11. Mod. 161. 12. Mod. 239. 486. 2. Ld. Ray. 1028.

(*a*) 8. Co. 96.

(*b*) See also the case of Bunhill *v.* Newton, cited Comb. 113. where an only son administered to his father, made his executors, and died, and a stranger took out administration *de bonis non, &c.* of the father; and the court of exchequer held, that it was not a case within the statute of *Distributions*, because, being an only son, he was intitled to *all* his father's effects at common law. But HOLT, *Chief Justice*, in citing this case, 2. Show. 26. says, that it was within the statute, and that an interest vested in an only child. But it appears, 2. Show. 407. that the question was concerning a mortgage which the father had purchased in the name of his only son, and that equity decreed it to the father's administrators because it was his money. In the report of the principal case, however, 2. Show. 408. the Court admit that the case of one child is as unquestionably within the statute as where there are several children; for the end of the law was, that *all* should have it as well as *one*; but deny, that there is any more *vesting* by the *statute* than there was at *common law*. But it has been since determined, in the case of Brown *v.* Shore, 1. Show. 2. 25. that an interest is clearly vested by the statute; and *Sir B. Shower*, 2. Show. 486. says, so it hath been held in chancery and the exchequer all along. See also Skin. 213. Palmer *v.* Gerrard, Prec. in Ch. 21.

(*c*) Ognel's Case, 4. Co. 51. 1. Cro. 106.

had

had right could not appeal after fourteen days, which the fon could not do at that diftance; and fo by this means a wrongful adminiftrator was entitled to the whole, and he whofe right it was had no remedy to recover at his return. But now this inconvenience is likewife redreffed by the ftatute of Diftributions, for when the fon returns he may put the bond in fuit. And for thefe reafons it was prayed that the prohibition might ftand.

PALMER *againft* ALLICOCK.

2. Vern. 302. Prec. Ch. 44. 84. 118. 255. Cafes T. T. 73. 12. Mod. 618. Gilb. E. R. 70. 98. Fitzg. 205. Stra. 891. 1111. 1118. 1. Peer. Wms. 378.

MR. WILLIAMS argued *for the defendant* in *Eafter Term*, 2. *Jac.* 1. The fubftance of his argument was, That though the plaintiff had gotten adminiftration, yet no intereft was thereby vefted in him, but that the appeal was proper; and for this he cited the cafe of *Beamond v. Long* (*a*), which was, *Baron* and *feme* adminiftratrix of her former hufband recover in debt; the *feme* died; the furviving hufband brought a *fcire facias* to have execution; and upon a demurrer all the Court, but HYDE, agreed that the *fcire facias* would not lie for the hufband alone, becaufe it was a debt demanded by the adminiftratrix *in auter droit.* This ftatute hath not wholly altered the common law in this matter; it only limits the practice of ecclefiaftical courts, and makes provifion for particular purpofes, *viz.* That diftribution fhall be made to the wife and children, and their children, which is fo far introductory of a new law, but no farther; fo that the right of adminiftration is as it was before; and therefore muft be granted to the next of kin of the father. This Court hath no power to grant a prohibition in fuch a cafe; and if it fhould, it is the firft which ever was granted of this kind, for it ought not to be determined here, but in an ecclefiaftical court, which hath an original jurifdiction of this caufe, and the appeal is *in proprio loco.*

1. Vern. 396. 2. Vern. 118. 249. Prec. Ch. 225. 312. 412. 10. Mod. 163. 246. 2. Ld. Ray. 1050.

1. Vern. 134. 437. 2. Vern. 8. 49. 76. 10. Mod. 21. 272. 1. Peer. Wms. 9. 544.

To which MR. POLLEXFEN anfwered, that the contrary was very plain, for here have been many prohibitions granted even upon * this very act; and the queftion now before the Court is not concerning the manner of diftribution, but the right of adminiftration, whether any intereft is vefted in the fon or not? It is true, the eftate in law goes to the adminiftrator, but the intereft and right to fue for and to recover the eftate goes to the fon; fo that if he fhould die before he is in actual poffeffion, his adminiftrator fhall have it to pay debts and to diftribute, &c. In the cafe of a will, if a man fhould devife his eftate to his wife and children after debts and legacies paid, an intereft vefts in thofe children; which doth not differ from the cafe at the bar; but in the one cafe the teftator makes the will, and in the other it is made by an act of parliament. Some inconveniencies have been already mentioned if the law fhould be otherwife taken, but there be many more; for if no intereft fhould veft in the child till actual diftribution, he could neither be trufted for his education or neceffaries whilft living, and nobody would bury him if he fhould happen to die before the year and a day, for the funeral charges

*[65]

Comyns, 716. Cafes T.T. 127.

(*a*) Cro. Car. 208.

would

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would be loſt *(a)*. It will likewiſe occaſion delays in adminiſtrators to make diſtribution, in hopes of gain; neither will any honeſt man take an adminiſtration upon himſelf, becauſe he can neither pay money ſafely, or take a releaſe; for if the infant die before diſtribution it is void.

But notwithſtanding theſe reaſons THE COURT gave judgment in *Michaelmas Term* following, that *a conſultation* ſhould go, the Chief Juſtice being abſent *(b)*.

(*a*) See Jenkins *v.* Tucker, 1. H. Bl. Rep. 90.

(*b*) *Sir B. Shower* ſays, the reaſon of three of the Judges was, becauſe *they* had a juriſdiction. To which he adds, "TAMEN QUÆRE, for it ſeems if "they proceed contrary to the ſtatute "*they* ought to be prohibited." S. C. 2. Show. 486. See 1. Show. 25.

Case 25.

Memorandum.

The demiſe of Charles the Second, and the acceſſion of James. S. C. Skin. 230.

THIS TERM KING CHARLES THE SECOND *demiſed.* He ſickened upon *Candlemas Day* in the morning, being *Monday* the ſecond day of *February*, and died upon *Friday* the ſixth day of *February*, 1684, in the thirty-ſeventh year of his reign; and at three o'clock in the afternoon of the ſame day the *Duke of York* was proclaimed KING.

EASTER

EASTER TERM,

The First of James the Second,

IN

The King's Bench.

KING'S BENCH.		COMMON PLEAS.	
Sir Geo. Jefferies, *Knt. Chief Justice.*		*Sir* Thomas Jones, *Knt. Chief Justice.*	
Sir Fran. Wythens, *Knt.*	*Justices.*	*Sir* Job Charlton, *Knt.*	*Justices.*
Sir Rich. Holloway, *Knt.*		*Sir* Thomas Street, *Knt.*	
Sir Thomas Walcot, *Knt.*		*Sir* H. Beddingfeild, *Knt.*	

EXCHEQUER.

William Montague, *Esq. Chief Baron.*

Sir Edward Atkins, *Knt.*	*Barons.*
Sir Edward Nevil, *Knt.*	
Christopher Milton, *Esq.*	

Sir Robert Sawyer, *Knt. Attorney General.*
Heneage Finch, *Esq. Solicitor General.*

*[66]

* Rex *against* Marsh and Others. Case 26.

If an affray happen between *smugglers* and *revenue-officers* in the execution of their duty, and *an officer*, on being twice knocked down, shoot one of the *smugglers*, it is not MURDER.

3. Inst. 47.

JAMES MARSH, JOHN W. and JOHN L. were indicted upon the coroner's inquest for the murder of *R. D.* at *H.* in *Kent*; and upon this indictment they were arraigned and tried at the bar this Term.

The fact, upon the evidence, appeared to be, that the prisoners were *custom-house officers*, who, suspecting that some wool would be transported, went to the sea-side in the night-time, where there happened an affray, and the prisoner *Marsh* was twice knocked down, and recovering himself shot the deceased. They were all acquitted of the murder.

1. Hale, 449. Kely. 60. 1. Hawk. c. 85. f. 50. Cowp. 830. Dougl. 207.

To insert into an indictment the names of those against whom in truth it was not found is forgery.

[67]

S. C. 3. Salk. 172. 3. Inst. 72. 8. Mod. 192. 12. Mod 493. Fitzg. 261. Stra. 69. 1. Hawk. P. C. 177. 336 338. 2. Bac. Abr. 567. 12. Mod. 602

Then upon complaint made, that *Marsh* only was found guilty upon the *coroner's inquest*, two of the said jury were now sworn in court, who deposed, that they upon the coroner's inquest found the *indictment* against *Marsh* alone, which indictment was in *English*; but that one *J. D.* who was then mayor of *H.* and who by virtue of that office was also coroner, took the indictment, and told the jury it must be turned into *Latin*, which was done, and he then inserted the names of the two other prisoners now at the bar.

Whereupon the said *Mr. D.* was now called, and he appearing was bound in a recognizance to answer this matter; and the two prisoners, who were acquitted, were likewise bound to prosecute him; and the jury-men were ordered to put their affidavit in writing, and swear it in court.

* An information was afterwards exhibited against *Mr. D.* which was tried at the bar in *Trinity Term* following, and he was found guilty; but having spoke with the prosecutor in the long vacation, he was only fined twenty nobles in *Michaelmas Term*.

Case 27. ## Roberts *against* Pain.

The Court will not grant a *prohibition* to stay a suit against a person for taking orders as a *priest* under the age of *twenty three*, or as a *deacon* under the age of *twenty-four*.

1. Vent. 127. 2. Mod. 278. Lutw. 1029. Stra. 715. 776. Cowp. Ju. 142. Gibson, 116. 3. Bac. Abr. 121. 10. Mod. 386. Fitzg. 169. Comyns, 25. 309. 1. Ld. Ray. 810. 856. 991. 2. Term Rep. 473.

PROHIBITION TO THE COURT OF ARCHES.—The case was, The plaintiff was presented by the mayor and aldermen of *Bristol* to the parish-church of *Christ-church* in the said city, and the defendant libelled against him, because he was not twenty-three years of age when made *Deacon*, nor twenty-four when he entered into the orders of *a Priest*; and the statute 13. *Eliz.* c. 12. requires that none shall be made a minister, or admitted to preach, being under that age.

The reason now alledged for a prohibition was, Because this matter was triable at law, and not in the spiritual court, because, if true, a temporal loss, *viz.* deprivation, might follow.

But THE COURT denied the prohibition, and compared this case to that of a drunkard or ill-liver, who are usually punished in the ecclesiastical courts, though a temporal loss may ensue; and if prohibitions should be granted in all cases where deprivation is the consequence of the crime, it would very much lessen the practice of those courts.

Case 28. ## David Burgh's Case.

If the officers of one parish give a pauper money to remove into another parish, and the parish to which he removes permit him to remain there *forty days*, he thereby gained a [illegible], and cannot be sent back.—Post. 247. 1. Show. 12. Carth. 28. 2. Lev. 22. [illegible] 472. 8. Mod. 30. 49. 62. 235. 320. 326.

THE PARISHIONERS of the parish of *St. Leonard* in *Foster-lane* gave this man (who had a wife and five children) five pounds in money to remove into another parish, upon condition that if he returned in forty days he should repay the money.

He removed accordingly, and stayed away by the space of forty days.

David Burgh's Case.

The parish to which he removed obtained an order, upon an appeal, for his settlement in the last parish, where he was lawfully an inhabitant.

This order being removed into this court, and the matter appearing thus upon affidavits, they declared their opinion only upon the order to remove, *viz.* that the man had gained a settlement in the parish to which he removed; for he being an inhabitant there for so long time as was required by law to make a settlement *(a)*, and not disturbed by the officers, they were remiss in their duty; and THE COURT would not help their negligence.

(*a*) By 13. & 14. *Car.* 2. c. 12. persons coming to settle in any parish in any tenement under the yearly value of ten pounds, may be removed by a justice of peace, upon complaint of the parish-officers, within *forty days* after such person shall so come to settle. But by 1. *Jac.* 2. c. 17. s. 3. the forty days continuance to make a settlement shall be accounted from *notice in writing* delivered to the churchwardens or overseers; and by the 3. *Will.* & *Mary*, c. 11. they shall be reckoned from the *publication* of such notice in the church. And as no facts, however strong, can amount to a constructive notice, no such clandestine settlement can now be gained. See Rex *v.* Abbots Langley, Foley, 110. Stra. 835.; Rex *v.* Talbury, Foley, 123.; Rex *v.* Chertsey, 5. Mod. 454.; and Mr. Const's Edition of Bott's Poor Laws, 1. vol. page 119. to 128. where all the cases upon this subject are collected.

/ TRINITY TERM,

The First of James the Second,

IN

The King's Bench.

Sir George Jefferies, *Knt. Chief Justice.*
Sir Francis Wythens, *Knt.*
Sir Richard Holloway, *Knt.* } *Justices.*
Sir Thomas Walcot, *Knt.*
Sir Robert Sawyer, *Knt. Attorney General.*
Heneage Finch, *Esq. Solicitor General.*

* The King *against* Dangerfield.

Case 29.

THE DEFENDANT was convicted of publishing *a libel*, wherein he had accused THE KING, when *Duke of York*, that he had hired him to kill the late *King Charles*, &c. And on *Friday June* 20, 1685, he was brought to the bar, where he received this sentence, *viz.* That he should pay a fine of five hundred pounds; that he should stand twice in the pillory, and go about the Hall with a paper in his hat signifying his crime; that on *Thursday* next he should be whipped from *Aldgate* to *Newgate*, and on *Saturday* following from *Newgate* to *Tyburn*; which sentence was executed accordingly.

Punishment of *Dangerfield* for a libel accusing *the prince* of having hired him to kill *the king*.

See 4. State Trials, 166. 681. and Emlyn's Preface.

As he was returning in a coach on *Saturday* from *Tyburn*, one *Mr. Robert Frances*, a barrister of *Gray's Inn*, asked him in a jeering manner, whether he had run his heat that day? He replied to him in scurrilous words. Whereupon *Mr. Frances* run him into the eye with a small cane which he had then in his hand, of which wound the said *Mr. Dangerfield* died on the *Monday* following. *Mr. Frances* was indicted for this murder; and upon not guilty pleaded was tried at THE OLD BAILEY, and found guilty, and executed at *Tyburn* on *Friday July* the 24*th*, in the same year.

It is murder to kill a man for using provoking words, although he was convicted, and under execution for another crime.

S. C. Append. to 10. State Trials, page 34, 35.

Case 30. Mr. Baxter's Case.

A defamatory writing expressing only part of a title, as "The Bishops," may, if from the nature of the *libel* the meaning be clear, be applied by *innuendo* to "the bishops of *England*."

S. C. Trem. 45. 196. 265. S. C. 10. State Trials, App 37. 12. Mod. 139. Ld. Ray. 879. 3. Bac. Abr. 493. 1. Hawk. P. C. 353. Salk. 224. 1. Ld. Ray. 486. 879. 3. Bac. Abr. 494. Cowp. 276.

HE was a non-conformist minister, against whom an information was exhibited for writing a book which he entitled, "A Paraphrase upon the New Testament."

The crime alledged against him in the information was, That he * intending to bring the protestant religion into contempt, and likewise *the bishops* (INNUENDO the bishops of *England*), did publish the libel, in which was contained such words, &c. setting forth the words. He was convicted.

MR. WILLIAMS moved in arrest of judgment,—FIRST, That the words in the information and "*the bishops*" therein mentioned were misapplied "to the protestant religion" and "the bishops of "*England*" by such *innuendoes*, which could not support this charge against the defendant.

SECONDLY, That the *distringas* and *habeas corpora* were *inter nos et* RICHARDUM BAXTER, which could not be, because the information was exhibited in the name of THE ATTORNEY GENERAL.

But THE COURT over-ruled these exceptions, and said, that by the word "*bishops*" in this information, no other could be reasonably intended but "the *English* bishops."

THE COURT thereupon fined him five hundred pounds, and ordered him to give security for his good behaviour for seven years.

Case 31. Procter *against* Burdet.

In covenant on indenture of apprenticeship to find the apprentice in meat, drink, lodging, and all other things necessary, a breach assigned in the words of the covenant is sufficient.

S. C. 3. Lev. 170. Yelv. 39. 1. Sid. 30. Ray. 14.

AN ACTION OF COVENANT was brought by AN APPRENTICE, setting forth the indenture, by which the defendant, his master, had covenanted to find and allow the plaintiff meat, drink, lodging, and all other things necessary, during such a time; and the breach was as general as the covenant, *viz.* that he did not find him meat, drink, lodging, *et alia necessaria.* The plaintiff had judgment by *nil dicit*; and upon a writ of enquiry brought, entire damages were given against the defendant.

And in a writ of error upon this judgment, the error assigned was, That the breach was too general, and that entire damages were given, amongst other things, for *alia necessaria*, and doth not say for what; and a case was cited in the point in *Trinity Term* 16. *Jac.* 1. where the judgment was reversed for this very reason (*a*).

3. Lev. 170 319. 4. Mod. 188. Lutw. 329. 1. Show. 252. Cro. Jac. 202. 486. Carth. 110. 125. 2. Mod. 138. 10. Mod. 227. 443. 11. Mod. 78. 133. 12. Mod. 327. 406. Stra. 208. 229. 231. 4. Bac. Abr. 17. 1. Ld. Ray. 106. 968. 1140. Comyns, 89. 376.

(*a*) Astel *v.* Mills, Cro. Jac. 436.

THE

PROCTER *against* BURDETT.

THE COUNSEL *contra* argued, That that which is required in an action of covenant is, that there may be such a certainty, as the defendant may plead a former recovery in bar if he be sued again; and therefore one need not be so particular in assigning of the breach upon a covenant as upon a bond; for in a bond for performance of covenants, where there is a covenant to repair, if it be put in suit, it is not sufficient to say, that the house is out of repair, but you must shew how *(a)*; but in a covenant it is enough to say, that it was out of repair. * If, in this case, the plaintiff had shewed what necessaries were not provided for him, it would have made the record too long, and therefore it is sufficient for him to say, that the defendant did not find *alia necessaria* (*b*). The case of *Astel v. Mills* has since been adjudged not to be law (*c*), for many contrary judgments have weakened the authority of it, *viz.* That the breach may be assigned as general as the covenant; as where a man covenanted that he had a lawful estate and right to let, &c. the breach assigned was, that he had no lawful estate and right to let, &c. and doth not shew that the lessor had not such right, or that he was evicted; yet it was held good. *[70]

CURIA. In a *quantum meruit* they formerly set out the matter at length, but now of late, in that action, in general words; and also in trover and conversion, *pro diversis aliis bonis* hath been held good, which is as general as this case *(d)*. There are many instances where breaches have been generally assigned and held ill; that in *Croke* is so, but the later opinions are otherwise.

The judgment was affirmed (*e*).

(*a*) 1. Ld. Ray. 107, and see Harman's Case, 2. Mod. 176.

(*b*) Keilway, 85.

(*c*) Cro. Jac. 170. 304. 367. 1. Roll. Rep. 173. 3. Bulst. 31. 2. Saund. 373.

(*d*) See Radley *v.* Rudge, 1. Stra. 738.; Bottomley *v.* Harrison, 1. Stra. 809. 2. Ld. Ray. 1529.; White *v.* Graham, 1. Stra. 827.; Shalmer *v.* Pulteney, 1. Ld. Ray. 276.; Mansfield *v.* Marsh, 2. Ld. Ray. 824.; Thornton *v.* Barnard, 2. Ld. Ray. 991.; Rex *v.* Maccarty, 2. Ld. Ray. 1181.; Knight *v.* Barker, 2. Ld. Ray. 1219. 11. Mod. 66.; Wiatt *v.* Essington, 2. Ld. Ray. 1410.; Kemp *v.* Andrews, 12. Mod. 3.; Hesseltgrave *v.* Thompson, Fitzg. 161.

(*e*) See Hughes *v.* Richman, Cowp. 125.

Pye *against* Brereton. Case 32.

A LEASE was made of tithes for three years, rendering rent at *Michaelmas* and *Lady-day*; and an action of debt was brought for rent arrear for two years: upon *nil debet* pleaded, the plaintiff had a verdict.

Debt on a lease for rent reserved at *Michaelmas* and *Lady-day* must shew at which feast the year expired; but the omission is aided by a verdict.

It was now moved in arrest of judgment, that the declaration was too general, for the rent being reserved at two feasts, the plaintiff ought to have shewed at which of those feasts it was due.

Cro. Eliz. 262. 702. Cro. Jac. 668. 1. Show. 9. 1. Salk. 141. Ld. Ray. 819. 5. Com. Dig. "Pleader" (2. W. 14.). 12. Mod. 81. 10. Mod. 69. 277. 324. Dougl. 683. 1. Term Rep. 148

PYE *against* BRERETON.

But the Counsel *for the plaintiff* said, That it appears by the declaration, that two years of the three were expired; so there is but one to come, which makes it certain enough.

CURIA. This is helped by the *verdict*; but it had not been good upon *a demurrer*.

MICHAELMAS TERM,

The First of James the Second,

IN

The King's Bench.

Sir Edward Herbert, *Knt. Chief Justice.*
Sir Francis Wythens, *Knt.*
Sir Richard Holloway, *Knt.* } *Justices.*
Sir Robert Wright, *Knt.*
Sir Robert Sawyer, *Knt. Attorney General.*
Heneage Finch, *Esq. Solicitor General.*

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* Memorandum. Case 33.

IN TRINITY VACATION last died SIR FRANCIS NORTH, Baron of *Guildford*, and Lord Keeper of THE GREAT SEAL of *England*, at his house in *Oxfordshire*, being a man of great learning and temperance. Death of *Lord North.* Skin. 237.

And SIR GEORGE JEFFERIES, Baron of *Wem*, and Chief Justice of the *King's Bench*, had the Seals delivered to him at *Windsor*, and was thereupon made Lord High Chancellor of *England*. *Jefferies* created Lord Chancellor.

And SIR EDWARD HERBERT, one of the King's Counsel, succeeded him in the place of Chief Justice. *Sir Edward Herbert* made Chief Justice of King's Bench.

There died also this Vacation, SIR THOMAS WALCOT, one of the Justices of the *King's Bench*, and he was succeeded by SIR ROBERT WRIGHT, one of the Barons of the *Exchequer*. Death of *Mr. Justice Walcot*, and promotion of *Baron Wright*.

Case 34. Sir John Newton and Others *against* Stubbs.

To say of a *justice of the peace*, that "He makes use of the king's commission to worry men out of their estates," is actionable.

ACTION ON THE CASE FOR WORDS.—The plaintiffs declared, that they were *Justices of the Peace* for the county of *Gloucester*, &c. and that the defendant spake these scandalous words of them: "*Sir John Newton* and *Mr. Meredith* make "use of the king's commission to worry men out of their estates;" and that afterwards on the same day they spoke these words: "*Sir* "*John Newton* and *Mr. Meredith* make use of the king's com-"mission to worry me and *Mr. Creswick* out of our estates." And afterwards these words were laid in *Latin* (without an ANGLICE) "*ad tenorem et effectum sequen.*" &c. There was a verdict for the plaintiffs, and entire damages.

S. C. 2. Show. 435. Post. 163. 4. Co. 16. 1. Roll. Abr. 57. Cro. Car. 14. 1. Mod. 22. Cro. Jac. 90. 143. 246. Cro. Eliz. 536. Yelv. 57. Hard. 501. Fort. 206. Ld. Ray. 1369. Stra. 617. 1168.

Slander laid in *Latin* is good, without averring that the hearers understood it.

MR. TRINDAR now moved in arrest of judgment, FIRST, That the words in the declaration are laid in *Latin*, without an *Anglicè*, and without an averment that the hearers understood *Latin*.

S. C. 2. Show. 435. 1. Roll. Abr. 74. 86. Cro. Eliz. 496. 865. Hob. 126. 268. But now by the statute 2. *Geo.* 2. c. 26. and 6. *Geo.* 2. c. 14. all law proceedings whatsoever shall be in the *English tongue* and language only, the names of writs and other technical words excepted. See 2. Hawk. 341.

*[72]

Words must be precisely laid, and not "to "the *tenor and* "*effect* follow-"ing."

* SECONDLY, It is not expressly alledged, that the defendant spoke those very words, for, being laid *ad tenorem et effectum sequen.* something may be omitted which may alter the sense and meaning of them.

And for this very reason judgment was stayed (*a*), though THE COURT held the words to be actionable.

S. C. 2. Show. 436. Cro. Eliz. 857. 572. 645. Salk. 661. 8. Mod. 328. 11. Mod. 84. 95. 100. 12. Mod. 218. 2. Stra. 934.

(*a*) But *Sir B. Shower*, in reporting this case, says, *Quære*, If, being after verdict, it was not well enough, and the *ad effectum* surplusage; for being *hæc falsa et scandalosa ad effectum sequent.* the *hæc* rendered it sufficiently certain, and the other words, being idle, ought to have been rejected; but had it been *quædam verba ad effectum sequent.* it had undoubtedly been ill. And see the case of Nelson *v.* Dixie, Annally's Rep. [illegible]. that only the substance or *legal effect* of the words may be set out. *Sed Qu.* See Rex *v.* Horne, Cowp. 672. to 689.

Case 35. The King *against* Ayloff and Others.

If a person outlawed for high treason do not surrender himself within a year, pursuant to 5. & 6. *Edw.* 6. c. 11. he shall be executed without other judgment or trial.—S. C. Trem. 12. Ante, 42. 47. 10. Mod. 188. 359. 380. 409. Stra. 530. 824.

THEY were outlawed for *high treason*, and on *Tuesday* the 27th day of *October* they were brought to the bar, and a rule of court was made for their execution on *Friday* following.

THE

THE CHIEF JUSTICE said, that there was no hardship in this proceeding to a sentence upon an outlawry, because those malefactors who wilfully fly from justice, add a new crime to their former offence, and therefore ought to have no benefit of the law; for though a man be guilty, yet if he put himself upon his trial, he may, by his submissive behaviour and show of repentance, incline the king to mercy. In felonies, which are of a lower nature than the crimes for which these persons are attainted, flight even for an hour is a forfeiture of the goods of the criminal; so likewise a challenge to three juries is a defiance to justice; and if that be so, then certainly flying from it is both despising the mercy of the king, and contemning the justice of the nation.

THE KING *against* AYLOFF AND OTHERS.

See 2. Hawk. P.C.ch.49.s.14.

They were both executed on *Friday* the 30th of *October* following.

The King *against* Colson and Others. Case 36.

AN INFORMATION was exhibited against the defendants, setting forth, that they, with others, did riotously assemble themselves together, to divert a watercourse, and that they set up a bank in a certain place, by which the water was hindered from running to an ancient mill in so plentiful a manner as formerly, &c.

On an information for *riotously* diverting a *watercourse*, a verdict finding the defendant guilty of diverting a watercourse, and not guilty of the *riot*, is repugnant and void.

Upon not guilty pleaded, it came to a trial; and the jury found that *quoad factionem ripæ*, the defendants were guilty, and *quoad riotum* not guilty.

* MR. WILLIAMS moved in arrest of judgment, because that by this verdict the defendants were acquitted of the charge in the information, which was the *riot*; and as for the erecting of the bank, an action on the case would lie.

* [73]

2. Roll. Abr. 695. Hob. 262. 1. And. 41. Cro. Car. 495.

And the judgment was accordingly arrested.

Stra. 873. 1. Bl. Rep. 291. 350. 3. Burr. 1264. 2. Salk. 594. But see Rex *v.* Fieldhouse, Cowp. 325.

Mason *against* Beldham. Case 37.

Trinity Term, 1. Jac. 1. Roll 408.

THE plaintiff brings his action against the defendant, and sets forth, That in consideration that he would suffer the defendant to enjoy a house and three water mills, &c. he promised to pay so much yearly as they were reasonably worth; and avers that they were worth so much. The defendant demurred.

The question was, Whether this action would lie for rent?

An *assumpsit* will lie on *express promise* to pay so much rent yearly as the house and mills enjoyed by the defendant should be reasonably worth.—Post. 149. 240. 1. Roll. Abr. 7. Cro. Jac. 598. 668. Cro. Eliz. 242. 786. 859. Cro. Car. 343. Hob. 284. 3. Lev. 150 Hard. 366. 1. Leon 43. 273. Skin. 238. 242. 10. Mod. 20. 86. 12. Mod. 324. 511. 1 Ld. Ray. 663. 2. Ld. Ray. 1036. Stra. 763. 776. 1089. 1. Term Rep. 378.

Mason against Beldham.

It was argued for the defendant, that it would not lie, becaufe it was a real contract. It is true, there is a cafe which feems to be otherwife; it is the cafe of *Acton v. Symonds* (*a*), which was in confideration that the plaintiff would demife to the defendant certain lands for three years, at the rent of twenty-five pounds by the year, he promifed to pay it; this was held to be a perfonal promife, grounded upon a real contract; and by the opinion of three Judges, the action did lie, becaufe there was an exprefs promife alledged, which muft alfo be proved; but CROKE, *Juftice*, was of a contrary opinion (*b*).

MR. POLLEXFEN, *contra.* If a leafe be made for years, referving a fum in grofs for rent, and which is made certain by the leafe, in fuch cafe an action of debt will lie for the rent in arrear; but if where no fum certain is referved, as in this cafe, a *quantum meruit* will lie; and no reafon can be given why a man may not have fuch an action for the rent of his land, as well as for his horfe or chamber.

And judgment was given for the plaintiff (*c*).

(*a*) Cro. Car. 414. S. C. Jones, 304. S. C. 1. Roll. Abr. 8.

(*b*) CROKE, *Juftice*, doubted, becaufe there was a leafe made and a rent referved, by which the perfonal contract was determined. Cro. Car. 415.

(*c*) And now by 11. *Geo.* 2. c. 19. It fhall be lawful for landlords, when the agreement is not by deed, to recover a reafonable fatisfaction for the lands, tenements, or hereditaments, held or occupied by the defendant, "in an *action on the cafe*, for the *ufe and* "*occupation* of what was fo held or enjoyed; and if in evidence on the trial of fuch action, any parol demife, "or any agreement (not being by deed) whereon a certain rent was referved, "fhall appear, the plaintiff in fuch "action fhall not, therefore, be nonfuited, "but may make ufe thereof as an evi-"dence of the *quantum* of damages to be "recovered.

*[74]
Cafe 38.

* Anonymous.

If a perfon proceed for flander in the fpiritual court, when fome of the words are of temporal cognizance, a prohibition fhall go for the whole.

THERE was a libel in the fpiritual court for fcandalous words, *viz.* "She is a bitch, a whore, an old bawd."

And a prohibition was now prayed by MR. POLLEXFEN, becaufe fome of the words were actionable at law, and fome punifhable in the fpiritual court; and therefore prayed that it might go *quoad* thofe words which were actionable at law.

THE CHIEF JUSTICE granted it, becaufe the words were an entire fentence, and fpoken all together at the fame time, and therefore if a prohibition fhould n[illegible] it would be a double vexation.

Jones, 44. 2. Roll. Abr. 297. 1. Sid. 404. Godb. 63. And'r. 7. 2'6. Comyns, 235. 11. Mod. 112. 117. 10. Mod. 71. 385. 440. 12. Mod. 36. 242. 4. Com. Dig. 529. 1. Ld. Ray. 103. 212. 236. 397. 423. 446. 508. 637. 2. Ld. R[illegible]. 1136. 1287. 1. Stra. 187. 471. 545. 555. 2. Stra. 623. 946. 1100. Cowp. 424. 2. Term Rep. 473.

EASTER TERM,

The First and Second of James the Second,

IN

The King's Bench.

Sir Edward Herbert, *Knt. Chief Justice.*
Sir Francis Wythens, *Knt.*
Sir Richard Holloway, *Knt.* } *Justices.*
Sir Robert Wright, *Knt.*
Sir Robert Sawyer, *Knt. Attorney General.*
Heneage Finch, *Esq. Solicitor General.*

* The Earl of Yarmouth *against* Darrel. Case 39.

THE plaintiff brought an action on the case, setting forth *Letters patents* of king *Charles the Second*, by which the sole printing of *blank writs*, *bonds*, and *indentures* were granted to him, excepting such forms which belonged to the CUSTOM HOUSE, and which were formerly granted to *Sir Roger L'Estrange*; that this grant was to continue for the space of thirty years; that the defendant had notice thereof; and that he had printed five hundred *blank bonds*; which he laid to his damage of the sum of forty pounds.

Letters patent granted by the king for the sole printing of blank writs, bonds, and indentures, are void. Post. 126.

2. Ro. Ab. 214. 1. Ro. Rep. 4. 8. Co. 125. Hard. 55. 108. Comb. 53. Skin. 361. 2. Ro. Ab. 174. 2. Roll. Rep. 113. 1. Vern. 120. 275. 10. Mod. 107. 2. Atk. 484. 1. Hawk. P. C. 471. 3. Ba. Ab. 627. Gil. E. R. 213. 10. Mod. 105. 131.

Upon not guilty pleaded, THE JURY found a special verdict, the substance of which was, that the defendant was a stationer; and that the *Company of Stationers* for the space of forty years last past, before the granting of these letters patents, had constantly printed *blank bonds*; and so made a general conclusion.

The only question was, Whether this patent vested a sole interest in the plaintiff, exclusive to all others?

MR. TRINDAR, *for the plaintiff*, insisted on these points.— FIRST, That the king has a prerogative in printing, and may grant it exclusive to others. SECONDLY, That this prerogative extends to the case at the bar. That he has such a prerogative is

THE EARL OF YARMOUTH *against* DARREL.

is confirmed by constant usage, for such grants have been made by the kings of *England* ever since printing was invented: but to instance in a few, *viz.* * the patent for printing of *law books* was granted to one *More* on the 19th day of *January*, in the fifteenth year of king *James the First*; and when that patent was expired, another was granted to *Atkyns* and others, on the 15th day of *November*, in the twelfth year of king *Charles the Second* (*a*). In 23. *Eliz.* a patent was granted to the *Company of Stationers* for the sole printing of *psalm-books* and *psalters* for the space of thirty years. And on the 8th of *August*, 31. *Eliz.* the like patent was granted to *Christopher Barker* for life. Another patent to the *Company of Stationers* for printing of *Corderius*, &c. These, and many more of the like nature, shew what the constant usage hath been. Now the statute of Monopolies 21. *Jac.* 1. c. 3. doth not reach to this case, because of the proviso therein to exempt all such grants of sole printing; and by the statute 14. *Car.* 2. c. 33. (*b*) regulating the press, it is enacted, "That no person shall print any copy "which any other hath or shall be granted to him by letters "patents, and whereof he hath the sole right and privilege to "print." And upon the breaches of these statutes several judgments have been given. In the case of *Streater v. Roper* (*c*) in this court, it is true the judgment was against the plaintiff; but upon a writ of error brought in parliament that judgment was reversed. The same Term there was a judgment given upon a special verdict in the common pleas for the plaintiffs, who were *The Company of Stationers v. Seymour* (*d*), for printing of *almanacks*. And they obtained the like judgment against *Wright*, for printing of *psalters* and *psalm-books* (*e*). Now to apply this to the principal case; it is to be considered, that the books for which the sole printing was so claimed were of a public nature and importance, relating to the good and benefit of the subjects; and so likewise are *blank bonds*, for there may be false and vicious impressions, to the ruin and destruction of many innocent people.

1. Vern. 225. 244. 1. Ld. Ray. 214. 3. Peer. Wms. 33.

And as a further argument that the king hath this prerogative, it is likewise to be considered, that where no individual person can claim a property in a thing, there the king hath a right vested in him by law; and it cannot be pretended that any particular person hath a right to print those bonds; therefore the finding that such were printed by THE COMPANY for above forty years is immaterial; because there being an inherent prerogative in the king, whenever he exerts it all other persons are bound up who were at liberty before. [77] * To prove which, the judgment in the case of the *East India Company* is express in point; for before that patent the subject had liberty to trade to those places prohibited by that

(*a*) See thee case of Streater *v.* Roper, 4. Bac. Abr. 209. Skin. 234. 2. Show. 250. 4. Burr. 2316.

(*b*) This act, after several continuances, expired in the year 1694.

(*c*) Michaelmas Term, 14. *Car.* 2. Roll 237.

(*d*) Hilary Term, 35. *Car.* 2. in B. R. Roll 99. 1. Mod. 256.

(*e*) 1. Mod. 256. 2. Show. 260. 1. Vern. 120. See the case of Basket *v.* the University of Cambridge, 1. Burn's Ecc. Law, title, "College," 1. Vern. 275. See also Lucas, 105. 2. Chan. Cases, 76.

grant; but afterwards they were restrained by that grant. Neither is this in the nature of a monopoly; it is not like that of the sole grant of making *cards*, which hath been adjudged void (*a*), and with great reason, because that grant reached to prohibit a whole trade, and therefore differs from this case; for the defendant may print other instruments or books, and exercise his trade in some other lawful and profitable commodities; and so might the merchants in the case of the *East India Company*, for they were restrained by the patent as to particular places, but might trade to any other part of the world. Neither will the subjects in general receive any prejudice by this or such like grants; for if the patentees make ill use of their privileges, though it cannot be properly called an office, yet it is a trust, and a *scire facias* will lie to repeal their grants.

THE EARL OF YARMOUTH *against* DARREL.

See the case of East India Company *v.* Mathews, Gilb. Eq. Rep. 213.

10. Mod. 258, 354.

It was argued by the counsel *for the defendant*, that the verdict having found that the *Company of Stationers* had used to print those bonds for above forty years before the making of this grant, the question will be, Whether they are now divested of a right so long enjoyed? And as to that, it is not a new thing to object, that notwithstanding such grants, yet other persons have insisted on a right to print, and have printed accordingly. Thus the sole printing of *law books* was granted to one *Atkyns*, yet the reports of JONES, *Justice*, and of my LORD CHIEF JUSTICE VAUGHAN were printed without the direction of the patentees (*b*). Printing, as it is a manual occupation, makes no alteration in this case, for the king hath as great a prerogative in writing any thing that is of a public nature, as he hath in printing of it. Now considering printing as an art exclusive from the thing printed, this patent is not good: for if a man invent a new art, and another should learn it before the inventor can obtain a patent, if afterwards granted it is void. Then consider it in relation to the thing printed, which in this case are *blank-bonds*; it is not a new invention, because *the Company of Stationers* have printed such above forty years, and for that reason this patent is void; for where the invention is not new, there trade shall not be restrained (*c*). * No man can receive any prejudice by the printing of such bonds, for they are of no use till filled up; it is only a bare manufacture of setting of so many letters together; but filling up the blanks makes them of another nature. Grants of things of less moment have been adjudged monopolies; as a patent for the sole making of all bills, pleas, and briefs in the Council of *York*; for by the same reason a like patent might be granted to make all declarations in the courts of WESTMINSTER-HALL.

Sed Quære.

* [78]

2. Roll. Abr. 215. pl. 5.

CURIA. The king hath a prerogative to grant the sole printing to a particular person (*d*). All the cases cited for the plaintiff do not reach the reason of this case; for there is a difference between things of a public use and those which are public in their nature: even

(*a*) 11. Co. 84.
(*b*) Carter, 89.
(*c*) 1. Roll. 4. 11. Co. 53.
(*d*) See 4. Burr. 2383, 2384.

almanacks

THE EARL OF YARMOUTH *against* DARREL.

almanacks have been used to ill purposes, as to foretel future events; yet they are of public use to shew the feasts and fasts of the church.

THE COURT inclined that the patent was not good (*a*).

(*a*) It was resolved in the case of Sir Robert Fludd, that a patent for the sole printing of wills and inventories in the prerogative court is void, because it is in restraint of trade. 2. Roll. Abr. 214. pl. 4. See also the case of Mounson *v.* Lyster, W. Jones, 231. 3. Bac. Abr. 627. Townsend's Collection of Proceedings in Parliament, 244, 245.

Case 40. Jackson *against* Warren.

If a *distringas* omit or mistake the *day* or *place* on or at which the assizes were held, it may be *amended* by THE ROLL.

A MOTION was made in arrest of judgment, For that *the day when* the assizes were to be held, and *the place where*, were left out of the *distringas*; and so a mis-trial.

But THE COURT were of another opinion; for if there had been no *distringas*, the trial had been good; because the *jurata* is the warrant to try the cause, which was right.

1. Roll. Rep. 201. Cro. Jac. 162.

And therefore the *distringas* was ordered to be amended by *the roll.*

1. Salk. 48. Stra. 136. 1. Com. Dig. 315. 10. Mod. 88. 12. Mod. 107. 274. 1. Ld. Ray. 95. 511. 2. Ld. Ray. 1144. 1. Bac. Abr. 100. 3. Bac. Abr. 275. Cowp. 407. 425. 1. Term Rep. 783. See 14. *Edw.* 3. c. 6. 9. *Hen.* 5. c. 4. 8. *Hen.* 6. c. 12. 18. *Eliz.* c. 14. 4. & 5. *Ann.* c. 16.

Case 41. The King *against* Sparks.

An indictment lies at sessions on 1. *Eliz.* c. 2. and 13. & 14. *Car.* 2. c. 4. for using other prayers instead of the common prayers; but it must state, that they were used *instead* of the prayers enjoined.

IT is enacted by the statute of 1. *Eliz.* c. 2. "That every minister shall use the church service in such form as is mentioned in the book of common prayer, and if he shall be convicted of using any other form, he shall forfeit one whole year's profit of all his spiritual promotions, and suffer six months imprisonment."

And by the statute 13. &. 14. *Car.* 2. c. 4. s. 17. "All ministers are to use the public prayers, in such order and form as is mentioned in the COMMON PRAYER BOOK, with such alterations as have been made therein by the convocation then sitting (*a*)."

*[79]

S. C. 2. Show 447. 2. Roll. Abr. 222. Poph. 59.

* The defendant was *indicted* at the quarter sessions in *Devonshire*, for using *alias preces* in the church, *et alio modo* than mentioned in the said book; and concludes *contra formam statuti:* he was found guilty, and fined one hundred marks; and a writ of error brought.

8. Mod. 63. 179. 10. Mod. 121. 337 358. 364. 409. 12. Mod. 104. 165. 239. 398. 446. 502. 634. 1. Hawk. P. C. 14. 1. Ld. Ray. 347. 682. 2. Ld. Ray. 1033. Cowp. 524.

(*a*) But see the Toleration Act, 1. *Will. & Mary*, c. 18. s. 8.

MR.

MR. POLLEXFEN and MR. SHOWER argued *for the plaintiff* in error, that this indictment was not warranted by any law; and the verdict shall not help in the case of an indictment, for all the statutes of *jeofails* have left them as they were before. Now the fact, as it is laid in this indictment, may be no offence, because to use prayers *alio modo* than enjoined by the book of common prayer, may be upon an extraordinary occasion, and so no crime. But if this should not be allowed, the justices of peace have not power in their sessions to enquire into this matter *(a)*; and if they had power, they could not give such a judgment, because the punishment is directed by the statute.

THE KING *against* SPARKS.
1. Stra. 62.
2. Hawk. P. C. ch. 25. s. 57. 119. 123. 126.
Doug. 153.

THE WHOLE COURT were of this opinion.

THE CHIEF JUSTICE said, that the statute of the 23. *Eliz.* c. 1. could have no influence upon this case, because another form is now enjoined by later statutes; but admitted that offences against that statute were inquirable by the justices.—The indictment ought to have alledged that the defendant used other forms and prayers instead of those enjoined, which were neglected by him; for otherwise every parson may be indicted that uses prayers before his sermon, other than such which are required by the book of common prayer.

(*a*) See Rex *v.* James, 1. Stra. 1256. 2. Salk. 680.

Clerk *against* Hoskins.

Case 42.

DEBT UPON A BOND for the performance of covenants in certain Articles of agreement; in which it was recited, WHEREAS the now defendant had found out a mystery in colouring stuffs, and had entered into a partnership with the plaintiff for the term of seven years, he did thereupon covenant with him, that he would not procure any person to obtain *letters patents* within that term to exercise that mystery alone. The defendant pleaded, that he did not *procure* any person to obtain *letters patents*, &c. * The plaintiff replied; and assigned for breach, that the defendant did within that term procure *letters patents* for another person to use this mystery alone, for a certain time. *Et hoc petit quòd inquiratur per patriam.* And a demurrer to the replication.

On a covenant not to procure letters patent, if the defendant plead that he did not procure them, and the plaintiff assigns for breach that he did procure them, the replication must conclude to *the country*.

*[80]

These exceptions were taken:

FIRST, That the plaintiff hath not set forth what term is contained in the *letters patents*.

Ray. 98.
Yelv. 137.
Cro. Jac. 14.
1. And. 20.
Carth. 88.
2. Saund. 337.
Lutw. 101. 528.
Stra. 1220.
2. Burr. 1022.

SECONDLY, That he had pleaded both *record* and *fact* together; for the *procuring* is the fact, and the *letters patents* are the *record*; and then he ought not to have concluded to the country, *prout patet per recordum*.

Com. Dig. "Pleader" (E. 32.). 1. Burr. 1317. Cowp. 575. Dougl. 428. *acc.* Ray. 1240. 2. Burr. 772. 3. Burr. 1725. 2. Term Rep. 439.

CLERK *against* HOSKINS.

To which it was answered, that the plaintiff was a stranger to the term contained in the *letters patents*, and therefore could not possibly shew it; but if he hath assigned a full breach, it is well enough.

8. Mod. 173. 376. 346. 10. Mod. 297. 304. 12. Mod. 101. 2. Stra. 735. 1177.

Then as to the other exception, *viz.* the pleading of the *letters patents* here is not matter of record; here is a plain negative and affirmative upon which the issue is joined, and therefore ought to conclude, *et hoc petit, &c.*

CURIA. There is a covenant that the defendant shall not procure *letters patents* to hinder the plaintiff within the seven years of the partnership: now this must be the matter upon which the breach ariseth, and not the *letters patents*; so that it had been very improper to conclude *prout patet per recordum.*

Judgment for the plaintiff.

Case 43.

The King *against* Hethersal.

Defect of *form* in coroner's inquisition is amendable. Post. 101. 238. 1. Sid. 225. 259.

THE DEFENDANT was *felo de se*, and the coroner's inquest found him *a lunatic.*

MR. JONES now moved for a *melius inquirendum.*

BUT IT WAS DENIED, because there was no defect in the inquisition.

The Court will grant a *melius inquirendum* for misbehaviour in the *jury* or *coroner*. Post. 238.—1. Vent. 182. 2. Jones, 198. Carth. 72. 2. Lev. 141. 152. 1. Salk. 90. Stra. 1097. 1. Hawk. P. C. 104. 2. Hawk. P. C. 88. 1. Bac. Abr. 496. 12. Mod. 496.

But THE COURT told him, that if he could produce an affidavit that the jury did not go according to their evidence, or of any indirect proceedings of the coroner, then they would grant it.

Year of the king must be in *coroner's inquisition.*—Stra. 261.

But it was afterwards quashed, because they had omitted the year of the king.

*[81]

Case 44.

* Friend *against* Bouchier.

Trinity Term, 34. Car. 2. Roll 920.

EJECTMENT upon the demise of *Henry Jones*, of certain lands in *Hampshire.*

If a testator devise lands to *A.* for life; with remainder to his first son and the heirs of his body; and for default of such issue, to *B.* and the heirs of his body, with several remainders over; and in default of such issue, to *C.* and his heirs; with A MEMORANDUM declaring, that his will and meaning is, that *A.* shall not alien the lands from the heirs male of his body, but that upon default of such issue they shall remain to *B.* and the heirs male of his body; his declaration in the *memorandum* does not restrain the prior words of the *will*; and therefore the son of *A.* shall take the estate in tail general.—S. C. 1. Eq. Abr. 184. S. C. Skip. 240. S. C. Pollex. 657. S. C. 2. Show. 405. Dyer, 171. Moor, 13. 2. Leon. 69. 3. Leon. 115. 4. Mod. 318. 1. Salk. 226. 2. Vern. 450. 1. Vent. 230. 2. Bac. Abr. 60, 61, 9. Mod. 148. 207. 10. Mod. 181. 376. 402. 523. 12. Mod. 52. 144. 278. 283. 1. Vern. 161. 1. Ld. Ray. 204. 209. 568. 2. Ld. Ray. 873. 1440. 1561. Stra. 804. 850. 1125. 1. Peer. Wms. 54. 42. 142. 290. 631. 2. Peer. Wms. 341. 371. 3. Peer. Wms. 178. Cases T. T. 3. 21. Gilb. E. R. 39. 67. 116. Comyns, 82. 372. 542. Cowp. 324. 410. 1. Term Rep. 82. 4. Term Rep. 605.

FRIEND *against* BOUCHIER.

THE JURY found this special verdict following, *viz.* That *William Holms* was seised in fee of the lands in question, and by his last will, dated in the year 1633, devised it to *Dorothy Hopkins* for life; remainder to her first son, and to the heirs of the body of such first son, &c. and for default of such issue to his cousin *William*, with several remainders over; and in default of such issue to *Anne Jones*, and to her heirs (who was the lessor of the plaintiff): that before the sealing and publishing of this will, he made this memorandum, *viz.* "MEMORANDUM, that my will and "meaning is, that *Dorothy Hopkins* shall not alien or sell the lands "given to her, from the heirs male of her body lawfully to be be-"gotten, but to remain, upon default of such issue, to *William* and "the heirs males of his body to be begotten, according to the "true intent and meaning of this my will." *Dorothy Hopkins* had issue *Richard*, who had issue *Henry*, who had issue a daughter, now the defendant.

The question was, Whether the son of *Dorothy* did take an estate tail by this will, to him and to the heirs of his body in general, or an estate in tail male?

This case was argued in *Michaelmas Term* in the thirty-sixth year of *Charles the Second*, and in the same Term a year afterwards, by counsel on both sides.

Those who argued *for the plaintiff* held, that the son had an estate in tail male; and this seems plain by the intention of the testator, that if *Dorothy* had issue daughters they should have no benefit, for no provision is made for any such by the will; and therefore the daughter of her son can have no estate, who is more remote to the testator. This is like the case of conveyances, wherein the *habendum* explains the generality of the precedent words; as if lands be given to husband and wife, and to their heirs, *habendum* to them and the heirs of their bodies, remainder to them and the survivor, to hold of the chief lord, with warranty to them and their heirs; this is an estate tail, with a fee expectant (*a*). So it is here, though the first words in the will extend to heirs, which is general; yet in the memorandum it is particular to heirs males, and the words "heirs" and "issues" are of the same signification in a will.

*[82]

* On the part of *the defendant:* The memorandum is a confirmation of the will, and the construction which has been made of it is not only inconsistent with the rules of law, but contrary to the intent of the testator, and against the express words of his will. Cases upon wills are different from those which arise upon deeds, because, in conveyances, subsequent words may be explanatory of the former; but in wills the first words of the testator do usually guide those which follow: as if land be devised for life, remainder to *F.* and the heirs males of his body, and if it happen

Fitzg. 199. 214. 224. 1. Peer. Wms. 20. 85. 97.

(*a*) Turnam *v.* Cooper, Cro. Jac. 476. S.C. Poph. 138. See also 25. Assise, pl. 14.

FRIEND *againſt* BOUCHIER.

that he die without heirs, not ſaying " males," the remainder over in tail; this was held not to be a general tail, but an eſtate in tail male, therefore the daughter of *F.* could not inherit (*a*). Now to conſtrue this to be an eſtate in tail male, doth not only alter the eſtate of the ſons of *Dorothy*, but of the iſſue of *William*, and nothing is mentioned in this *memorandum* of the limitation over to *Anne Jones*; ſo that the whole will is altered by it. But this *memorandum* cannot enlarge the eſtate of *Dorothy*, becauſe it is inconſiſtent with the intention of the teſtator, who gave her only an eſtate for life by the will; but if ſhe ſhould have an eſtate tail, ſhe might by fine and recovery bar it, and ſo alien it, contrary to his expreſs words. Beſides, there is no eſtate limited to *Dorothy* by this *memorandum*, and ſhe having an expreſs eſtate for life deviſed to her by the will, it ſhall never be enlarged by ſuch doubtful words which follow; as where a man had a hundred acres of land called by a particular name, and uſually occupied with a houſe, which houſe he let to *S.* with forty acres parcel of that land, and then deviſed the houſe and all the lands called by that particular name, &c. to his wife; it was adjudged that ſhe ſhould only have the houſe and the forty acres, and that the deviſe ſhall not be extended by implication to the other ſixty acres (*b*). So that, to make the deſign of this *will* and *memorandum* to be conſiſtent, the latter words muſt be conſtrued only to illuſtrate the meaning of the teſtator in the former paragraph of the will, and muſt be taken as a farther declaration of his intention, *viz.* that the heirs males mentioned in the *memorandum*, is only a deſcription of the perſons named in the will. The law doth uſually regard the intention of the teſtator, and will not imply any contradictions in his bequeſts.

[83] * THE COURT was of opinion that it was a plain caſe; for in the limitation it is clear that it is a general tail; and it doth not follow that the teſtator did not deſign any thing for his granddaughters, becauſe no proviſion was made for daughters: for where an eſtate is entailed upon the heirs of a man's body, if he hath a ſon and a daughter, and the ſon hath iſſue a daughter, the eſtate will go to her, and not to the aunt. Now this *memorandum* doth not make any alteration in the limitation, becauſe it directs that the eſtate ſhall go according to the true intent and meaning of the will, and is rather like a *proviſo* than an *habendum* in a deed.

And therefore judgment was given accordingly for the defendant.

(*a*) Dyer, 171. a. 1. Ander. 8. Goldſb. 16. Moor, 593.
(*b*) 2. Leon. 226. Moor, 593.

MICHAELMAS TERM,

The Firſt and Second of James the Second,

I N

The King's Bench.

Sir Edward Herbert, *Knt. Chief Juſtice.*

Sir Francis Wythens, *Knt.*
Sir Richard Holloway, *Knt.* } *Juſtices.*
Sir Robert Wright, *Knt.*

Sir Robert Sawyer, *Knt. Attorney General.*
Heneage Finch, *Eſq. Solicitor General.*

*[84]

Caſe 45.

* Hicks *againſt* Gore.

A mother places her daughter, an heireſs, under the care of a lady, to prevent her being run away with; the lady, colluſively, marries the girl to her own ſon, while ſhe was under ſixteen years of age; yet if ſuch marriage be without inticement, and openly, in a pariſh-church, within canonical hours, and by a regular clergyman, it is not within the penalties of

ON *Tueſday* the ſeventeenth day of *November* there was a trial at THE BAR by a *Somerſetſhire Jury*, in EJECTMENT.

The caſe was thus: The plaintiff claimed the lands by virtue of the ſtatute of 4. & 5. *Philip & Mary*, c. 8. by which it is enacted, "That it ſhall not be lawful for any perſon to take away any "maid or woman-child unmarried, and within the age of ſixteen "years, from the parents or guardian in ſocage; and that if any "woman-child or maiden, being above the age of twelve years, "and under the age of ſixteen, do at any time aſſent or agree to "ſuch perſon that ſhall make any contract of matrimony (con-"trary to the form of the act), that then the next of kin of ſuch "woman-child or maid, to whom the inheritance ſhould deſcend, "return, or come after the deceaſe of the ſame woman-child or "maid, ſhall from the time of ſuch aſſent and agreement have, "hold, and enjoy all ſuch lands, tenements, and hereditaments, "as the ſaid woman-child or maid had in poſſeſſion, reverſion, "or remainder, at the time of ſuch aſſent and agreement, during "the life of ſuch perſon that ſhall ſo contract matrimony, and

& 5. *Phil. & Mary*, c. 8. Poſt. 168.—1. Lev. 257. 2. Lev. 179. 1. Sid. 387. Cro. Car. 557. 5. Mod. 221. 2. Stra. 1162. 3. Bac. Abr. 578. 1. Hawk. P. C. 173.

"after

Hicks against Gore.

" after the deceafe of fuch perfon fo contracting matrimony, that " then the faid land, &c. fhall defcend, revert, remain, and come " to fuch perfon or perfons as they fhould have done in cafe this " act had never been made, other than him only that fo fhall " contract matrimony."

Benjamin Tibboth, being feifed in fee of the lands in queftion, to the value of feven hundred pounds *per annum*, had iffue a fon and four daughters; the fon had iffue *Ruth* his only daughter, who

* [85]

was married to the defendant *Gore*; her father died in the * time of her grandfather, and her mother, fearing that this daughter might be ftolen from her, applies herfelf to my *Lady Gore*, and entreats her to take this daughter into her houfe, which fhe did accordingly. My lady had a fon then in *France*; fhe fent for him, and married him to this *Ruth*, fhe being then under the age of fixteen years, without the confent of her mother, who was her guardian.

The queftion was, Whether this was a forfeiture of her eftate during life?

The Chief Justice faid, that the ftatute was made to prevent children from being feduced from their parents or guardians by flattering or enticing words, promifes, or gifts, and married in a fecret way to their difparagement; but that no fuch thing appeared in this cafe, for *Dr. Hafcard* proved the marriage to be at *St. Clement's Church*, in a canonical hour; that many people were prefent; and that the church-doors were open whilft he married them.

A perfon who is to receive a gratuity on the event of a caufe cannot be a witnefs.

It was proved at the trial that the mother had made a bargain with the leffor of the plaintiff, that in cafe he recovered fhe fhould have a thoufand pounds, and the thirds of the eftate; and therefore fhe was not admitted to be a witnefs.

Poft. 168.

The plaintiff could not prove any-thing to make a forfeiture; and therefore was nonfuited.

12. Mod. 372. 385. 1. Ld. Ray. 85. 91. 507. 730. 744. 2. Ld. Ray. 1007. 1166. 1353. 1411. 2. Vern. 463. 472. 637. 700. 8. Mod. 60. 10. Mod. 150. 193. Fitzg. 80. Comyns, 90. 1. Peer. Wms. 288. 596. 3. Peer. Wms. 181. 288. 413. 1. Stra. 34. 101. 445. 506. 652. 2. Stra. 828. 833. 1148. 1253. See the cafes, Bent *v.* Baker, 3. Term Rep. 27.; and Bell *v.* Harwood, 3. Term Rep. 308.

Case 46. Anonymous.

If a *habeas corpus* be delivered to an inferior court *after iffue*, or if the Judge [illegible] not an *later* [illegible] and [illegible] in the [illegible] an *attachment* fhall go for contempt.—Cro. Car. 79. Prec. Chan. 546. Fitzg. 154. 2. Vern. 484 10. Mod. 127. 11. Mod. 7. 1. Stra. 567. 639. 1. Ld. Ray. 346. 556. 2. Ld. Ray. 766. 836. 1. Peer. Wms. 476. 4. Com. Dig. " Habeas Corpus" (G. 2.). Tidd's Pract. 177.

BY the ftatute of 21. *Jac.* 1. c. 23. it is enacted, " That no " writ to remove a fuit out of an inferior court fhall be obeyed, " unlefs it be delivered to the fteward of the fame court before " iffue or demurrer joined, fo as the iffue or demurrer be not " joined within fix weeks next after the arreft or appearance of " the defendant." Provided always, " that this act fhall ex- " tend only to fuch courts of record in cities, liberties, towns " corporate, and elfewhere, and for fo long time only as there is

" or

"or shall be an *Utter Barrister* of three years standing at the bar "of one of the four inns of court, that is or shall be steward, "&c. of the same inferior court." — Anonymous.

In this case issue was joined; and the steward refused to allow the *habeas corpus*; and the cause was tried, but not before an *Utter Barrister (a)*, as is directed by the statute.

Curia. The steward ought to return the *habeas corpus* (*b*); and they having proceeded to try the cause, no *Utter Barrister* being steward, let an *attachment* go.

(*a*) See Cro. Car. 79. Carth 69. and the case of Fairley *v.* Mac Connel, 1. Burr. 514.

(*b*) 1. Mod. 195. Carth. 59. 2. Cromp. Pract. 419. Tidd's Pract. 178.

*[86]

* Claxton *against* Swift.

Case 47.

Hilary Term, 1. Jac. 2. Roll 1163.

If the *indorsee* of a bill, on default of payment by the *acceptor*, recover against the *drawer*, but do not take out execution, this recovery cannot be pleaded *in bar* to a second action on the same bill, by the same indorsee, against the *first indorser*; for although the indorsee has recovered *damages*, he has not received *satisfaction*.

THE PLAINTIFF, being a merchant, brought an action upon a bill of exchange, setting forth the custom of merchants, &c. and that *London* and *Worcester* were ancient cities, and that there was a custom amongst merchants, that if any person living in *Worcester* draw a bill upon another in *London*, and if this bill be accepted and indorsed, the first indorser is liable to the payment: That one *Hughes* drew a bill of a hundred pounds upon *Mr. Pardoe*, payable to the defendant or order. *Mr. Swift* indorsed this bill to *Allen* or order, and *Allen* indorsed it to *Claxton*. The money not being paid, *Claxton* brings his action against *Hughes*, and recovers, but did not take out execution. Afterwards he sued *Mr. Swift*, who was the first indorser; and he pleads the first recovery against *Hughes* in bar to this action, and avers that it was for the same bill, and that they were the same parties. To this plea the plaintiff demurred, and the defendant joined in the demurrer.

S. C. 1. Lutw. 878. S. C. Nel. Lut. 270. S. C. 2. Show. 441. 494. S. C. Skin. 255. Yelv. 68. 1. Leon. 19. 3. Leon. 122. Cro. Jac. 73. 284. Latch. 124. Cro. Car. 75. Bunb. 199. Lutw. 880. 8. Mod. 43. 166. 242. 295. 307. 362. 373. 9. Mod. 60. 10. Mod. 109. 11. Mod. 190. 12. Mod. 36. 87. 192. 521. Comyns, 311. 1. Ld. Ray. 181. 442. 743. 753. 2. Ld. Ray. 1545. 1. Stra. 214. 441. 478. 525. 557. 648. 2. Stra. 733. 792. 817. 946. 1000. 1051. 1195. 1246. Dougl. 250. 1. Term Rep. 167. 4. Term Rep. 691. H. Bl. Rep. 89. *notis*.

Mr. Pollexfen argued that it was a good bar; because the plaintiff had his election to bring his action against either of the indorsers or against the drawer, but not against all; and that he had now determined his election by suing the drawer, and shall not go back again, though he never have execution; for this is not in the nature of a joint action, which may be brought against all. It is true, that it may be made joint or several by the plaintiff; but when he has made his choice by suing of one, he shall never sue the rest, because the action sounds in damages, which are uncertain before the judgment, but afterwards are made certain, *et transeunt in rem judicatam*, and is as effectual in law as a release: as in *trover* the defendant pleaded, that at another time

 the

CLAYTON *against* SWIFT.

the plaintiff had recovered against another person for the same goods so much damages, and had the defendant in execution; and upon a demurrer this was held a good plea (*a*); for though in that case it was objected, that a judgment and execution was no satisfaction unless the money was paid, yet it was adjudged that the cause of action being against several, for which damages

*[87] * were to be recovered, and because a sum certain was recovered against one, that is a good discharge against all the other; but it is otherwise in debt, because each is liable to the entire sum.

THE CHIEF JUSTICE. If the plaintiff had accepted of a bond from the first drawer in satisfaction of this money, it had been a good bar to any action which might have been brought against the other indorsers for the same; and as this case is, the drawer is still liable; and if he fail in payment, the first indorser is chargeable, because if he make indorsement upon a bad bill, it is equity and good conscience that the indorsee may resort to him to make it good.

But THE OTHER JUSTICES being against the opinion of the Chief Justice, judgment was given for the defendant (*b*).

(*a*) Brown *v.* Wootton, Cro. Jac. 73. Yelv. 65. 2. Ld. Ray. 1217.

(*b*) A writ of error was brought upon this judgment in the exchequer chamber, and the judgment reversed, S. C. 2. Show. 503. for the plaintiff had not obtained *satisfaction*; and it was held, that this case differed from that of *trespassers*, and might rather be resembled to the case of debtors on a joint and several bond; for by the custom of merchants the original *drawer*, and every *indorser*, is liable to pay the sum certain for which the bill is drawn to the *indorsee*, although the action is to recover it by way of damages. S. C. 1. Lutw. 882. b.

Case 48.

Pawley *against* Ludlow.

To debt on a *bail-bond* the defendant may plead, that after the arrest, and before the day of appearance, he rendered himself to the officer in discharge of the bond.

S. C. 2. Show. 443. Cro. Jac. 98. Moor, 850. Jones, 138. Ray. 100. Hob. 116. 8. Mod. 31. 130. 104. 240 280. 349. 10. Mod. 44. 153. 267. 303. 11. Mod. 2. 33. 12. Mod. 99. 112. 236. 319. 351. 423. 525. 559. 583. 601. Comyns, 554. 573. 1. Stra. 419. 443. 526. 781. 872. 1. Ld. Ray. 156. 2. Ld. Ray. 1097. 1177. 1259. 1452. 1. Com. Dig. 494, 495. 2. Term Rep. 757.

DEBT UPON A BOND.—The condition was, That if *John Fletcher* shall appear such a day *coram justitiariis apud Westm.* &c. that then, &c. The defendant pleaded, that after the 25th day of *November*, and before the day of the appearance, he did render himself to the officer in discharge of this bond. And to this the plaintiff demurred.

DARNEL, *for the defendant*, admitted, that if a *scire facias* be brought against the bail upon a writ of error, who plead that after the recognizance, and before the judgment against the principal affirmed, he rendered himself to the marshal in discharge of his bail, that this is not a good plea (*a*), but that the sureties are still liable,

(*a*) 3. Bulst. 291. Cro. Jac, 402.

liable, becaufe by the ftatute 3. *Jac.* 1. c. 8, they are not only liable to render his body, but to pay the debt recovered. But if a judgment be had in this court, and a writ of error brought in the exchequer chamber, and pending that writ of error the principal is rendered, the bail in the action are thereby difcharged *(a)*. PAWLEY *againft* LUDLOW.

It was argued *on the other fide*, that this is not like the cafe of bail upon a writ of error; for the condition of a recognizance and that of a bond for appearance are different in their nature; the one is barely that the party fhall appear on fuch a day; the other is, that he fhall not only appear and render *his body to prifon, but the bail likewife do undertake to pay the debt, if judgment fhall be againft the principal. Now where the condition is only for an appearance at a day, if the party render himfelf either before or after the day, it is not good. *[88]

HERBERT, *Chief Juftice*. If the party render himfelf to the officer before the day of appearance, he is to fee that he appear at the day, either by the keeping of him in cuftody, or by letting him to bail: the end of the arreft is to have his body here (*b*): if he had not been bailed, then he had ftill remained in cuftody, and the plaintiff would have his proper remedy; but being once let to bail, and not appearing in court according to the condition of the bond, that feems to be the fault of the plaintiff, who had his body before the day of appearance.

Judgment for the defendant.

(*a*) 1. Roll. Abr. 334. (*b*) 6. Mod. 238. Tidd's Practice, 147.

HILARY

HILARY TERM,

The First and Second of James the Second,

IN

The King's Bench.

Sir Edward Herbert, *Knt. Chief Justice.*
Sir Francis Wythens, *Knt.*
Sir Richard Holloway, *Knt.* } *Justices.*
Sir Robert Wright, *Knt.*
Sir Robert Sawyer, *Knt. Attorney General.*
Heneage Finch, *Esq. Solicitor General.*

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*[89]

* Serjeant Hampson's Case.

Case 49.

HAMPSON, *Serjeant*, was excommunicated for *Alimony*. By the statute of 5. *Eliz.* c. 23. s. 13. it is enacted, "that "if the offender against whom any such writ of *excom-* "*municato capiendo* shall be awarded, shall not in the same writ "of *excommunicato capiendo* have a sufficient and lawful *ad-* "*dition*, according to the statute of 1. *Hen.* 5. c. 5. or if in the "*significavit* it be not contained that the excommunication doth "proceed upon some cause, or contempt of some original matter "of heresy, or refusing to have his or their child baptized, "or to receive the holy communion as it is now commonly used "to be received in the church of *England*, or to come to divine "service, or errors in matters of religion or doctrine now received "and allowed in the said church of *England*, incontinency, usury, "simony, perjury in the ecclesiastical court, or idolatry, that "then all and every pains and forfeitures limited against such per- "sons excommunicated by this statute, by reason of such writ of

On an *excommunicato capiendo*, if the causes required by 5. *Eliz.* c. 23. s. 13. be not inserted in the *significavit*, the offender shall be discharged of the *forfeiture*, but not of the *excommunication*.
Ante, 42.
1. Jones, 226.
2. Jones, 89.
Cro. Car. 197. 199.
Latch. 174. 204.

1. Roll. Rep. 175. 1. Show. 17. 1. Salk. 294. 1. Vern. 24. 10. Mod. 69. 179. 11. Mod. 83. 172. 191. 12. Mod. 69. 275. 418. 517. 580. 1. Stra. 43. 76. 265. 413. 2. Stra. 946. 1067. 1189. 1. Ld. Ray. 619. 701. 2. Ld. Ray. 817. 1. Peer. Wms. 435. 3. Peer. Wms. 53.

"excommunicato

SERJEANT HAMPSON'S CASE.

" *excommunicato capiendo* wanting ſufficient addition, or of ſuch " *ſignificavit* wanting all the cauſes afore-mentioned, ſhall be " utterly void in law, and by way of plea to be allowed to the " party grieved."

And now MR. GIRDLER moved that he might be diſcharged, becauſe none of the aforeſaid cauſes were contained in the *ſignificavit.*

CURIA. He may be diſcharged of the *forfeiture* for that reaſon, but not of the *excommunication.*

Caſe 50.

Anonymous.

It muſt appear in a record of outlawry, that the county court was not only held *in* but *for* the county.

ONE who was outlawed for the murder of *Sir Edmund Bury Godfrey* now brought a writ of error in his hand to the bar, praying that it might be read and allowed; and it was read by MR. ASTRY, *Clerk of the Crown.*

1. Vent. 108. 1. Show. 309. 2. Show. 60. 12. Mod. 337.

The errors aſſigned were:—FIRST, That it did not appear upon the return of *the exigent* in the firſt *exactus*, that the Court was held *pro comitatu (a).*

1. Lev. 164. 2. Keb. 141. 4. Burr. 2527. 2564. 3. Bac. Abr. 772. 1. Ld. Ray. 215. 2. Ld. Ray. 1305.

* [90]

In outlawry of ſeveral, *non comparuerunt*, without *nec eorum aliquis*, is error.

* SECONDLY, That the outlawry being againſt him and two other perſons, it is ſaid in the laſt *exactus*, that *non comparuit*, but doth not ſay, *nec eorum aliquis comparuit.*

For theſe reaſons the outlawry was reverſed.

Cro. Jac. 358. Cro. Jac. 358.

2. Roll. Rep. 490. 2. Roll. Abr. 802. Cro. Eliz. 50. 2. Hale P. C. 204. Palm. 308. 3. Bac. Abr. 752.

Bail in murder on outlawry reverſed.

And he held up his hand at the bar, and pleaded *not-guilty* to his indictment, and was admitted to bail; and afterwards he was brought to his trial, and, no witneſs in behalf of the king appearing againſt him, he was acquitted.

(*a*) See Wilkes' Caſe, 4. Burr. 2527; Barrington's Caſe, 3. Term Rep. 500; Yendal's Caſe, 4. Term Rep. 521.

Caſe 51.

The Mayor and Commonalty of Norwich *againſt* Johnſon.

If a leſſee die inteſtate during *the term*, and a ſtranger enter and take poſſeſſion, he thereby becomes an EXECUTOR *de ſon tort* of the term; and if he commit waſte therein, he is liable, as EXECUTOR *de ſon tort*, to an action of waſte.— S. C. 2. Show. 457. S. C. Comb. 7. S. C. 3. Lev. 35. 2. Jones, 73. 1. Vent. 303. Moor, 126. 2. Mod. 293. 1. Com. Dig. 266. 10. Mod. 93. 117. 242. 281. 356. 410. 1. Stra. 453. 258. 2. Stra. 1006. 3. Peer. Wms. 431. 2. Term Rep. 97. 597.

A WRIT OF ERROR was brought to reverſe a judgment given for the plaintiff in the common pleas, in an action of *waſte.*

The

The Mayor and Commonalty of Norwich *against* Johnson.

The declaration was, That the plaintiff demised a barn to one *Took* for a certain term, by virtue whereof he was possessed, and being so possessed died; that the defendant was his *executor*, who entered and made *waste* by pulling down of the said barn. The defendant pleaded, that *Took* died intestate, and that he did not administer. The plaintiff replied, that he entered as EXECUTOR *of his own wrong*. To this plea the defendant demurred; and the plaintiff joined in the demurrer.

MR. APPLETON of *Lincoln's Inn* argued *for the plaintiff*, and said, That an action of *waste* would not lie against the defendant, because the mayor and commonalty, &c. had a remedy by an *assise* to recover the land upon which the barn stood, and a *trover* to recover the goods or materials; and that such an action would not lie against him at the common law, because he neither was tenant by the courtesy nor in dower, against whom waste only lay. So that if the plaintiff be entitled to this action, it must be by virtue of the statute of *Gloucester*, 6. *Edw.* 1. c. 5.; but it will not lie against the defendant even by that statute, because the action is thereby given against the tenant by the courtesy, in dower, for life or years, and treble damages, &c. But the defendant is neither of those, and this being a penal law, which not only gives treble damages, but likewise the recovery of the place wasted, ought therefore not to be taken strictly, but according to equity. * Tenants at sufferance, or at will, by *elegit*, or tenants by statute staple, and also pernors of profits, were never construed to be within this statute; and therefore a particular act, 11. *Hen.* 6. c. 5. was made to give him in reversion an action of waste, where tenant for life or years had granted over their estates, and yet took the profits and committed waste (*a*). [91]

Then the question will be, What estate this EXECUTOR *de son tort* hath gained by his entry? And as to that he argued, that he had got a fee-simple by *disseisin*, and that for this reason the plaintiff was barred from this action; for if the son purchase lands in fee and is disseised by his father, who makes a feoffment in fee to another with warranty, and dieth, the son is for ever barred; for though the *disseisin* was not done with any intention to make such a feoffment, yet he is bound by this alienation (*b*). So where a man made a lease for life and died, and then his heir suffered a recovery of the same land without making an actual entry, this is an absolute *disseisin*, because the lessee had an estate for life; but if he had been tenant at will, it might be otherwise (*c*). But admitting that the defendant is not a disseisor, then the plaintiffs must bring their case to be within the statute of *Gloucester*, as that he is either tenant for life or years (*d*). If he is tenant for life,

(*a*) 1. Vern. 23. 157. 2. Vern. 711. 738. Prec. Chan. 454. 9. Mod. 109. Gilb. E. R. 127. Cases T. T. 12. 16. 1. Peer. Wms. 406. 527. 2. Peer. Wms. 240. 397. (606). 3. Peer. Wms. 267.

(*b*) 1. Roll. Abr. 662.

(*c*) 10. Mod. 125. 265. Cases T. T. 237. 1. Ld. Ray. 35.

(*d*) 12. Mod. 441. 471.

THE MAYOR AND COMMONALTY OF NORWICH, *against* JOHNSON.

life, he must be so either by right or by wrong. He cannot be so by right, because he had no lawful conveyance made to him of this estate; besides, it is quite contrary to the pleading, which is, that he entered wrongfully. Neither can he be so by wrong, for such particular estates, as for life or years, cannot be gained by *disseisin*, and so is *Heliar's Case* (*a*). Then if this should be construed an estate for years, it must be gained either by the act of the party or by the act of the law; but such an estate cannot be gained by either of those means.—FIRST, It cannot be gained by the act of the party, because an EXECUTOR *de son tort* cannot have any interest in a term; and for this there is an express authority in this court (*b*), which was thus, *viz.* A lease in reversion for years was granted to a man who died intestate; his wife, before she had administered, sold this term to the defendant, and afterwards she obtained letters of administration, and made a conveyance of the same term to the * plaintiff; and judgment was given for the last vendee, because it was in the case of a reversion of a term for years, upon which no entry could be made, and of which there could be no EXECUTOR *de son tort*; though it was admitted by the Court, that such an executor might make a good sale of the goods before administration granted. Neither can any entry or claim make the defendant an EXECUTOR *de son tort* of a term for years, because a wrongful entry can never gain any estate but a fee-simple; for it is not to be satisfied with any particular or certain estate, as for life or years. It cannot be gained by act of law, because that abhors all manner of wrong. If it should be objected, that though this executor doth not gain any estate for his own benefit, yet he in the reversion may take him for a disseisor, and it shall be in his election either to make him so, or a tenant for years; to this it may be answered, that the defendant doth not claim by colour of any grant; if he did, then he might be *a disseisor* at the election of him in the reversion; and this was the very difference taken in the case of *Blunden v. Baugh* (*c*). So likewise if it be objected, that the defendant is an occupant, and therefore punishable for waste. But the reason is not the same, because the entry of an occupant is lawful, and he gains an estate for life, which is not this case. An EXECUTOR *de son tort* is not a person taken notice of in the law in respect to him in the reversion, but in respect of the creditors of the intestate (*d*); and therefore if what he doth may be advantageous to them, the law will make a construction upon it for their benefit; but if such a person should be within the intention or meaning of this statute, then the natural consequences will be:—FIRST, That the place wasted would be recovered: SECONDLY, That the plaintiff would also have treble damages: both which would be a manifest means to defeat the creditors of their debts. For these reasons he prayed judgment for the plaintiff in the errors.

[92]

2. Ld. Ray. 1215. Comyns, 150. 10. Mod. 171. 3. Peer. Wms. 351. 2. Barnes, 137. 142. 1. Stra. 70. 97. 2. Stra. 781. 917. 1106.

See Taylor on demise of Atkins *v.* Horde, Cowp. 693.

12. Mod. 441. 471. Ld. Ray. 661.

(*a*) 6. Co. 25.

(*b*) Kendrick *v.* Burges, Moor, 126.

(*c*) Cro. Car. 302. 1. Roll. Abr. 661. Jones, 115. Latch. 53.—See also 1. Burr. 60. 79. 111. 5. Burr. 2830. Cowp. 693. 702.

(*d*) See Edwards *v.* Harben, 2. Term Rep. 587.

It

The Mayor and Commonalty of Norwich *against* Johnson.

* It was argued by the counsel *on the other side*, That it is plain that the defendant was EXECUTOR *de son tort*, for such must that person be who intermeddles with the intestate's estate, where there is no rightful executor or administrator. Now a man may be executor of his own wrong of a term for years, as appears even in that case cited out of *Moor* on the other side; and if so, the defendant must be liable to this action. The statute may be expounded as well against a wrongful as a rightful executor: it is plain here is a *disseisin*, and the law is now settled, that it shall be in the election of him in the reversion to make it so. This defendant would justify one wrong by another, for he confesses that he has committed a *disseisin*, and therefore will not be answerable for committing of waste. As to the objection that an EXECUTOR *de son tort* is liable only in respect of creditors, and that if he should be punished for waste it would be an injury to them, because of the treble damages recovered against him, the reply is, that such damages must be answered out of his own estate; for even in the case of a rightful executor, if he commit waste, he will be chargeable in a *devastavit de bonis propriis (a)*. This is not properly a penal but a remedial law, and as such may be construed according to equity. It is true, tenants by *elegit* or by statute are not within this statute, because waste by them committed is no wrong; for if they should fell the timber, it sinks the debt, and the cognizor may have a *scire facias ad computandum*.

10. Mod. 254. 276. 324.

CURIA. It would be an infinite trouble for him in the reversion to seek his remedy for waste done, if the law did oblige him to stay till there was a rightful administrator; and it is not to be doubted, but that there may be an EXECUTOR *de son tort* of a term for years. This is a remedial and yet a penal law, and therefore shall have a favourable construction.

The judgment was affirmed.

(*a*) Coulter's Case, 5. Co. 30.

* [94]

* Bridgham *against* Frontee.

Case 52.

An *alien* exercising the trade of *a vintner* is not an *alien artificer* within the 32. *Hen*. 8. c. 16. which enacts, "That "all leases of "any dwelling-"house or shop made to any stranger artificer or handicraft born out of the allegiance of the king, "not being a denizen, &c. shall be void."—Dyer, 2. *in marg*. 1. Sid. 309. 1. Saund. [illegible] 2. Show. 135. 9. Mod. 104. 10. Mod. 91. 116. 120. 136. 2. Stra. 1082. 1. Com. Dig. [illegible] Ld. Ray. 283. 853.

DEBT upon a bond for performance of covenants, in a lease of a house for a certain term of years, rendering rent, &c. The breach assigned was, That there was sixty-six pounds rent in arrear. The defendant pleaded the statute of 32. *Hen*. 8. c. 16. s. 13. "That all leases of dwelling-houses or shops made to any "stranger or alien artificer shall be void," and sets forth that the defendant was *a vintner* and an *alien artificer*. The plaintiff demurred.

BRIDGHAM *against* FRONTEE.

MR. THOMPSON, *for the defendant*, said, that a vintner was an artificer within the meaning of the act, which was made to prevent a mischief by foreigners encroaching upon the trades of the king's subjects, by which they gained their livelihood, and therefore shall be expounded largely and beneficially for them. A mercer, a draper, or grocer, are not properly artificers, yet they are within the meaning of this act.

THE CHIEF JUSTICE. This statute refers to another of 1. *Rich.* 2. c. 9. which prohibits alien artificers from exercising any handicraft in *England*, unless as a servant to a subject skilful in the same art, upon pain of forfeiting his goods; so that it is plain, that such who used any art or manual occupation were restrained from using it here to the prejudice of the king's subjects. Now the mystery of *a vintner* chiefly consists in mingling of wines, and that is not properly *an art*, but *a cheat*.

So the plaintiff had his judgment.

Case 53.

The King *against* Plowright and Others.

A statute imposing a duty to be levied by distress "and if any "dispute arise "about taking "the distress, "the same to "be *finally determined* by a "justice of the "peace," means only that it shall be final as to matter of *fact*, and does not take away a *certiorari*.

A DISTRESS was taken for *chimney money*; and the parties distrained apply themselves to the two next justices of the peace, before whom it appeared that *Plowright* let a cottage to *Hunt*, which was not of the yearly value of ten shillings; the collectors of this duty distrained upon the landlord, which the said justices thought to be illegal; and therefore they ordered a restitution: and *a certiorari* being brought to remove the order into this court,

MR. ATTORNEY prayed that it might be filed.

* MR. POLLEXFEN opposed it, for that the statute of 16. *Car.* 2. c. 3. enacts, "That no person inhabiting an house which hath "more than two chimnies shall be exempted from the payment of "the duty, &c." and then these words do follow, "That if any "question shall arise about the taking of any distress, the same "shall be heard and *finally* determined by one or more justices of "the peace near adjoining, &c." Now here was money levied by virtue of this act, and a controversy did arise by reason of the distress, and an order was made by the justices, which, according to the letter and meaning of the act, ought to be *final*; the intention whereof was to prevent the charge and trouble of poor men in suits at law about small matters, and therefore it gave the justices power to determine particular offences and oppressions.

* [95]

S. C. 2. Show. 458. F. N. B. 245. 8. Mod. 331. 10. Mod. 278. 11. Mod. 188. 197. 390. Comyns, 86. 1. Stra. 391. 2. Stra. 849. 934. 975. 2. Hawk. P. C. 406. Dougl. 555. 1. Term Rep. 735.

MR. ATTORNEY, *contra*. If the justices of peace have power to determine, &c. that is to make them judges whether this duty is payable or not; and so the courts of *Westminster*, who are the proper judges of the revenue of the king, who by this means will be without an appeal, will be excluded.

CURIA.

CURIA. This Court may take cognizance of this matter as well as in cafes of baftardy. It is frequent to remove thofe orders into this court, though the act fays, " That the two next " juftices may take order as well for the punifhment of the mother, " as alfo for the relief of the parifh where it was born, except he " give fecurity to appear at the next quarter feffions." The ftatute doth not mention any *certiorari*, which fhews that the intention of the law-makers was, that a *certiorari* might be brought, otherwife they would have enacted, as they have done by feveral other ftatutes, that no *certiorari* fhall lie. Therefore the meaning of the act muft be, that the determination of the juftices of the peace fhall be final in matters of *fact* only; as if a collector fhould affirm that a perfon has four chimnies when he has but two, or when the goods diftrained are fold under the value, and the overplus not returned; but the right of the duty arifing by virtue of this act was never intended to be determined by them.

THE KING *againft* PLOWRIGHT AND OTHERS.

The order was filed (*a*).

MR. POLLEXFEN then moved that it might be quafhed, For that by the ftatute of 14. *Car.* 2. c. 10. the *occupier* was only chargeable, and the *landlord* exempted. Now by the provifo in that act fuch *a cottage* as is expreffed in this order is likewife exempted, becaufe it is not of greater value * than twenty fhillings by the year, and it is not expreffed that the perfon inhabiting the fame hath any lands of his own of the value of twenty fhillings *per annum*, nor any lands or goods to the value of ten pounds. [96]

Now there having been feveral abufes made of this law to deceive the king of this duty, occafioned the making of this fubfequent act. The abufes were thefe, *viz.* The taking of a great houfe and dividing it into feveral tenements, and then letting them to tenants who, by reafon of their poverty, might pretend to be exempted from this duty: The dividing lands from houfes, fo that the king was by thefe practices deceived, and therefore in fuch cafes the charge was laid upon the landlord.

But nothing of this appearing upon the order, it was therefore quafhed.

(*a*) See 2. Burr. 1040. 3. Burr. 1458.

Brett *againft* Whitchot. Cafe 54.

REPLEVIN.—The defendant avowed the taking of a cup as a fine for a diftrefs towards the repairing of the highway. The plaintiff replied, and fet forth a grant from the king, by

A grant from the king, exempting the lands granted from the charge of repairing the highways, does not excufe parifhioners from the *ftatute duty* required by the highway acts.—S. C. Comb. 10. Co. Lit. 121. 2. Inft. 569. 6. Co. 73. 1. Vent. 90. 18[illegible]. 2. Saund. 161. 8. Mod. 19. 105. 11. Mod. 273. 12. Mod. 15. 1. Stra. 184. 2. Stra. 120[illegible]. 1. Ld. Ray. 725. 792. 2. Ld. Ray. 804. 856. 922. 1175. 1249. 2. Term Rep. 106.

Brett against Whitchot. which the lands which were chargeable to send men for the repairing, &c. were exempted from that duty; and the defendant demurred.

The question was, Whether the king's *letters patents* are sufficient to exempt lands from the charge of the repairing of the highways, which by the statute of *Philip* and *Mary* and other subsequent statutes are chargeable to send men for that purpose *(a)*?

And it was argued, that such *letters patents* were not sufficient, because they were granted in this case before the making of the statute, and so by consequence before any cause of action; and to prove this a case was cited to this purpose, in 2. *Edw.* 3. *pl.* 8. where an action was brought against an hundred for a robbery upon the statute of 13. *Edw.* 1. c. 1. & 4. and the *Bishop of Litchfield* pleaded a charter of *Richard the First*, by which that hundred, which was held in right of his church, was exempted, &c.; but it was held that this charter could not discharge the action, because no such action was given when the *letters patents* were made, but long afterwards *(b)*.

Judgment was given for the avowant.

(a) By 13. *Geo.* 3. c. 78. all former statutes relating to the repairs of the highway are repealed, and the laws reduced into one act.

(b) 2. Inst. 569.

*[97]

Case 55.

* Upton *against* Dawkin.

Trespass for taking fish *ipsius querentis in liberâ piscariâ* is not good, though after verdict.

S. C. Comb. 11. 8. Mod. 165. 272. 370. 10. Mod. 25. 37. 140. 251. 12. Mod. 96. 301. 383. 1. Stra. 503. 610. 637. 2. Stra. 820. 1. Ld. Ray. 239. 251. 276. 1. Term Rep. 430.

TRESPASS *quare vi et armis liberam piscariam* he did break and enter, and one hundred trouts *ipsius quer.* in the fishery aforesaid did take and carry away. Upon not guilty pleaded, there was a verdict for the plaintiff.

Exception was taken in arrest of judgment, For that the plaintiff declared in *trespass* for taking so many fish *ipsius quer. in liberâ piscariâ*, which cannot be, because he hath not such a property *in liberâ piscariâ* to call the fish his own.

Pollexfen *contra*. If there had not been a verdict, such a construction might have been made of this declaration upon a demurrer; but now it is helped, and the rather because a man may call them *pisces ipsius* in a free fishery; for they may be in a trunk *(a)*, so a man may have a property though not in himself *(b)*: as in the case of jointenants, where it is not in one, but in both; yet if one declare against the other, unless he plead the jointenancy in abatement the plaintiff shall recover.

But, notwithstanding, the judgment was reversed.

(a) See Lord Fitzwalter's Case, 1. Mod. 106; Carter *v.* Murcot, 4. Burr. 2162.; Seyman *v.* Courtness, 5. Burr. 2814.; Mayor of Lynn *v.* Turner, Cowp. 16.; Mayor of Orford *v.* Richardson, 4. Term Rep. 437. And 2. Black. Com. 139. Dougl. 56. 443. 517. 3. Term Rep. 253.

(b) See Smith *v.* Miller, 1. Term Rep. 480. and Ward *v.* Macauley, 4. Term Rep. 489. that trespass may be maintained on a *constructive* as well as an *actual* possession.

The

The King *against* Case 56.

THE DEFENDANT was indicted for *barratry*. The evidence against him was, That one *G.* was arrested at the suit of *C.* in an action of four thousand pounds, and was brought before a Judge to give bail to the action; and that the defendant, who was a *barrister at law*, was then present, and did solicit this suit, when in truth at the same time *C.* was indebted to *G.* in two hundred pounds, and that he did not owe the said *C.* one farthing.

If a *counsellor at law* encourage a man to bring false actions through malice, and for the purposes of oppression, he may be indicted as a *common barrator.*

THE CHIEF JUSTICE was first of opinion, that this might be *maintenance*, but that it was not *barratry*, unless it appeared that the defendant did know that *C.* had no cause of action after it was brought. If a man should be arrested for a trifling cause, or for no cause, this is no *barratry*, though it is a sign of a very ill christian, it being against the express word of God. * But a man may arrest another thinking that he has a just cause so to do, when in truth he has none, for he may be mistaken, especially where there have been great dealings between the parties. But if the design was not to recover his own right, but only to ruin and oppress his neighbour, that is *barratry*. A man may lay out money in behalf of another in suits at law to recover a just right, and this may be done in respect of the poverty of the party *(a)*; but if he lend money to promote and stir up suits, then he is a barrator. Now it appearing upon the evidence that the defendant did entertain *C.* in his house, and brought several actions in his name where nothing was due, he is therefore guilty of that crime *(b)*. But if an action be first brought, and then prosecuted by another, he is no barrator, though there is no cause of action.

* [98]

Co. Lit. 368. 1. Roll. Abr. 355. Cro. Jac. 527. 1. Sid. 282. 8. Mod. 230. 10. Mod. 223. 12. Mod. 516. Fitzg. 43. 98. 173. 1. Ld. Ray. 490. 2. Ld. Ray. 1248. 3. Peer. Wms. 375. 1. Hawk. P. C. 525. 542. 1. Bac. Abr. 280. 3. Bac. Abr. 524.

The defendant was found guilty.

(a) See Pearson *v.* Hughes, Freem. 71. 81.

(b) By 13. *Edw.* 1. c. 28. commonly called the statute of *Westminster the First*, "If any *serjeant, pleader*, or other, do "any manner of deceit or collusion in "the king's court, or consent unto it "in deceit of the court, or to beguile "the court or the party, and be thereof "*attainted*, he shall be imprisoned for a "year and a day, and from thenceforth "shall not be heard to plead in that "court for any man." See Dyer, 249. pl. 84. 2. Inst. 215.

Memorandum. Case 57.

TWO days before the end of this Term SIR CRESWELL LEVINZ, Judge in the Common Pleas, received a *supersedeas* under THE GREAT SEAL, signifying the king's royal pleasure to discharge him from the office of Judge.

MR. JUSTICE LEVINZ discharged from the Common Pleas.

3. Lev. 257.

EASTER TERM,

The Second of James the Second,

IN

The King's Bench.

Sir Edward Herbert, *Knt. Chief Justice.*

Sir Francis Wythens, *Knt.*
Sir Richard Holloway, *Knt.* } *Justices.*
Sir Robert Wright, *Knt.*

Sir Robert Sawyer, *Knt. Attorney General.*
Heneage Finch, *Esq. Solicitor General.*

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*[99]

Case 58.

* Memorandum.

THE first day of this Term, SIR THOMAS JONES, *Chief Justice* of the Common Pleas, had his *quietus*, and SIR HENRY BEDDINGFIELD, one of the *Justices* of the same Court, succeeded him in that office.

JONES, C. J. of C. B. removed, and BEDDINGFIELD promoted.

Likewise the Honourable WILLIAM MOUNTAGU, *Esq. Lord Chief Baron* of the Exchequer, had his *quietus*, and SIR EDWARD ATKYNS, one of the *Barons* of the same Court, succeeded him.

MONTAGU, C. B. removed, and ATKYNS promoted.

SIR JOB CHARLETON, one of the *Justices* of the Common Pleas, had his *quietus*, but was made *Chief Justice* of *Chester*.

CHARLETON removed, and made C. J. of *Chester*.

SIR EDWARD LUTWICH, *the King's Serjeant*, was made one of the *Justices* of the Common Pleas, and SERJEANT HEATH was made one of the *Barons* of the Exchequer.

LUTWICH and HEATH promoted.

Case 59. **Okel *against* Hodgkinson.**

In levying a fine, if any of the parties die before the return of the writ of covenant, the fine is erroneous.

THE FATHER AND SON join in a fine, in order to make a settlement upon the second wife of the father, who was only tenant by the courtesy, the remainder in tail to his said son. One of the cognizors died after the caption, and before the return of the writ of covenant.

And now a writ of error was brought to reverse it, and this was assigned for error.

* [100]

Post. 140. Cro. Eliz 468*. Comb. 57. Ray. 461. Ld. Ray. 872. 2. Wils. 220. Cruise on Fines, 49. 1. Burr. 360. Cowp. 622.

* CURIA. If it had been in the case of a purchaser for a valuable consideration, the Court would have shewed him some favour; but it being to do a wrong to a young man, they would leave it open to the law.

Case 60. **Memorandum.**

Sir JOHN HOLT, *Recorder of London*, and others, called to the degree of Serjeants.

THE first day of this Term, being the 22d day of *April*, there was a call of serjeants, *viz.* SIR JOHN HOLT of *Grays-Inn*, *Recorder of London*, who was made king's serjeant, SIR AMBROSE PHILLIPS, made also king's serjeant, CHRISTOPHER MILTON, JOHN POWELL, JOHN TATE, WILLIAM RAWLINSON, GEORGE HUTCHINS, WILLIAM KILLINGWORTH, HUGH HODGES, and THOMAS GEERS. They all appeared that day at the *Chancery Bar*, where having taken the oaths, THE LORD CHANCELLOR JEFFERIES made a short speech to them; after which they delivered a ring to him, praying him to deliver it to the king. They went from the *Inner Temple Hall* to *Westminster*, and counted at the Common Pleas, and gave rings, the motto whereof was, *Deus, Rex, Lex*.

Case 61. **The King *against* Saloway.**

The coroner ought not to presume *insanity* from the act of *suicide*.—Plowd. 261. Comb. 2. 1. Hawk. P. C. 102. 2. Bac. Abr. 480.

SALOWAY drowned himself in a pond; and the coroner's inquest found him *non compos mentis*; because it is more generally supposed a man in his senses will not be *felo de se*.

A coroner's inquisition finding that the deceased *seipsum emersit* is not good.

THE KING'S COUNSEL moved for a *melius inquirendum*, and that the inquisition might be quashed, for that it sets forth, *quod præd. defend. circa horam octavam ante meridiem in quoddam stagnum se projecit et per abundantiam aquæ ibidem statim suffocat. et emergit. erat*, which is insensible.

12. Mod. 112. 1. Sid. 204. 259. 1. Salk. 377. 1. Lev. 140. 182. 12. Mod. 112. 1. Hawk. P. C. 104. 2. Hawk. P. C. 340. 1. Bac. Abr. 496.

PEMBERTON, *Serjeant*, *contra*. Here is no exception taken to the substance of the inquisition, and the word "*suffocat.*" had been sufficient, if the word "*emergit.*" had been left out.

THE

THE COURT were of opinion, that there being another word in this inquisition which carries the sense, it is therefore sufficient; but if it had stood singly upon this word "*emergit.*" it had not been good.

THE KING *against* SALOWAY.

*[101]

And this fact happening about the time of the general pardon, THE COURT was of opinion, that where an interest is vested * in the king, a pardon of all forfeitures will not divest it, but that nothing was vested here before inquisition found.

The goods of a *felo de se* are not vested in the king till office found; and the forfeiture is therefore saved by a previous pardon.—5. Co. 110. 3. Inst. 54. 1. Sid. 150. 162. 1. Saund. 362. 2. Mod. 53. 4. Bl. Com. 190. 1. Hale P. C. 414. 1. Hawk. P. C. 104. 2. Bac. Abr. 482.

SECONDLY, It was objected, that this inquisition ought to set forth that *Saloway* came by his death by this means, *et nullo alio modo quocunq;*.

To which it was answered by PEMBERTON, *Serjeant*, that in matters of form only, the Judges have sent for the coroner into court, and ordered him to amend it.

If a coroner's inquest finds the *substance*, it may be amended for defect of *form*. 1. Sid. 225. 259. 1. Salk. 377. 2. Lev. 140. Stra. 261. Fitzg. 6. 1. Hawk. P. C. 104. 2. Bac. Abr. 482.

Rodney *against* Strode. Case 62.

AN ACTION ON THE CASE was brought against three defendants; one of them suffered judgment to go by default, and the other two pleaded not guilty. The cause was tried the last assizes at *Exeter*, and it was for imposing the crime of treason upon the plaintiff, and for assaulting and imprisoning of him. There was a verdict for the plaintiff, and one thousand pounds damages against *Mr. Strode*, and fifty pounds against the other defendant, who pleaded. The plaintiff entered a *nolle prosequi* against him who let the judgment go by default, and against the other defendant for the fifty pounds damages; and took judgment only against *Mr. Strode*.

The Court will not grant a new trial on the ground of excessive damages, in an action on the case for falsly charging the plaintiff with treason.

1. Mod. 2. *notis*. 1. Bl. Rep. 298. 384. 418. 2. Bl. Rep. 802. 851. 929. 955. 963. 1205. 1327. 1. Term Rep. 84. 277. 717. 2. Term Rep. 4. 113. 166.

PEMBERTON, *Serjeant*, moved for a *new trial*, by reason of the *excessive damages*, which were not proportioned to the quality of the plaintiff, he being a man of mean fortune.

But it was opposed by the plaintiff, For that the defendant pursued him as a traitor, and when he was apprehended for that crime he caused him to be arrested for one thousand pounds at the suit of another person, to whom he was not indebted.

THE COURT, upon consideration of the circumstances of the case, refused to grant a new trial.

In an action of trespass and false imprisonment against three *jointly*, if one of them confess the action, and the other two plead jointly not guilty, and the jury assess 1000l. damages on the default; and 50l. *each* on those who pleaded not guilty; the verdict is bad: but if the plaintiff enter a *nolle prosequi* as to the two who *pleaded*, he shall have judgment for the damages in the *default*.

Then PEMBERTON, *Serjeant*, *for the defendants*, moved in arrest of judgment, and for cause shewed, that the jury have found both guilty, and assessed several damages, which they cannot do, because this is a joint action, to which the defendants have pleaded jointly, and being found guilty *modo et formâ*, the jury cannot assess the damages severally, for the damage is the same by the one as the other; and therefore it hath been adjudged, that where an action of battery was brought against three, and one pleaded not guilty, and the other two *son assault * demesne*, and several damages found against them, it was held ill, for that very reason, because it was a joint offence *(a)*. It is true, where there are divers defendants, and damages assessed severally, the plaintiff has his election to take execution *de melioribus damnis*, but this is when the trials are at several times. So it is where they plead several pleas; as in an action of battery, one pleads not guilty, and the other justifies, and both issues are found for the plaintiff; in such case he may enter a *non pros.* against one, and take judgment against the other, because their pleas are several; but where they plead jointly, the jury cannot sever the damages *(b)*.

S. C. Carth. 19.
S. C. Comb. 18. 39.
S. C. 2. Show. 469.
11. Co. 6.
Cro. Jac. 118.
1. Roll. Rep. 31.
Hob. 66.
Brownl. 233.
Cro. Car. 239 243.
1 Roll. Abr. 784.
2 Bac. Abr. 9, 10.
8. Mod. 78. 296.
12. Mod. 12. 131.
2. Stra. 910. 1140.
2. Ld. Ray. 1381.

But MR. POLLEXFEN, *for the plaintiff*, insisted, that even in this case damages may be assessed severally; for where two defendants are sued for the same battery, and they plead the same plea, yet damages may be assessed severally *(c)*. So was the case of *Trebaresfoot v. Greenway* in this court, which was an action for an assault and battery and false imprisonment; one of the defendants pleaded not guilty, and the other justified; issue was joined; and there was a verdict for the plaintiff, and damages assessed severally; the plaintiff entered a *nolle prosequi* as to one, and took judgment against the other, and upon this a writ of error was brought in this court, and the judgment was affirmed. So if an action of trespass be brought against two for taking of one hundred pounds, where the one took seventy pounds, and the other thirty, damages shall be assessed severally. It was admitted, that regularly the damages ought to be entire, especially where the action is joint; but where the facts are several, damages may likewise be so assessed; but in this case the jury hath done what the Court would do, had it been in a criminal cause.

CURIA. This is all but one fact, which the jury is to try: it is true, when several persons are found guilty criminally, then the damages may be severed in proportion to their guilt; but here all are equally guilty of the same offence; and it seems to be a contradiction to say, that the plaintiff is injured by one to the value of fifty pounds and by the other to the value of one thousand pounds when both are equally guilty. Every defendant ought to answer full as much as the plaintiff is damnified; now how is it possible he should be damnified so much by one and so little by the other?

(a) Austin v. Millard, Cro. Eliz. 860.
(b) Walsh v. Bishop, Cro. Car. 239.
(c) Sampson v. Cramfield, 1. Bulst. 157. Rastal's Ent. 677.

But

⁎ But notwithstanding this opinion, judgment was afterwards given for the plaintiff *(a)*.

Rodney *against* Strode.

(a) By Wythens, Holloway, and Wright, *Justices*, against the opinion of Herbert, *Chief Justice*. S. C. Comb. 39. But it seems that the Chief Justice was afterwards of the same opinion with the rest of the Court, S. C. 2. Show. 470.; and, on writs of error being brought, this judgment was affirmed, both in the *exchequer chamber* and in the *house of lords*, S. C. Carth. 21.; for the *defect of the verdict* was cured by entering the *nolle prosequi*. See the case of Hill *v.* Goodchild, 5. Burr. 2791. where it is determined, that where the trespass is *jointly* charged on both defendants, and the verdict finds them both *jointly guilty*, the jury cannot afterwards assess *several* damages; and Noke *v.* Ingram, 1. Wils. 89. that where two defendants sever in pleading, and the one pleads a bankruptcy, which on issue joined is found for him, the plaintiff may enter a *nolle prosequi* as to him, and still proceed to final judgment, and execution against the other. Dougl. 169. *notis.*—See also Parker *v.* Laurance, 1. Hob. 70.; Stowley *v.* Eveley, 1. Hob. 180.; Walsh *v.* Bishop, Cro. Car. 239. 243.; Weller *v.* Goyton, 1. Burr. 358.; Rex *v.* Clarke, Cowp. 611.; Powel *v.* White, Dougl. 169.; Rose *v.* Bowler, H. Bl. Rep. 108.; Drummond *v.* Dorant, 4. Term Rep. 360.

Peak *against* Meker.

Case 63.

To say of a *merchant*, "He "is a rogue, a "*papist dog*, "and a pitiful "fellow," is actionable. Qu. Ante, 26.

ACTION ON THE CASE FOR WORDS.—The plaintiff declared, that he was a merchant, and bred up in the church of *England*; and that when the present king came to the crown, the said plaintiff made a bonfire at his door in the city of *London*, and the defendant then spoke of him these words, for which he now brought this action: "He" *(innuendo* the plaintiff) "is a rogue, "a papist dog, and a pitiful fellow, and never a rogue in town "has a bonfire before his door but he:" the plaintiff had a verdict, and five hundred pounds damages were given.—A writ of error was brought. But IT WAS ADJUDGED without argument, that the words were actionable.

2. Vent. 265. Ray. 483. 3. Lev. 30. Skin. 68. 88. 2 Show. 149. 250. 8. Mod. 283. 1. Com. Dig. 181. Ld. Ray. 812.

Joyner *against* Pritchard.

Case 64.

If a declaration say, that the defendant *prosecut. fuit et adhuc prosequitur*, it shall be intended at the time when the action was commenced.

AN ACTION was brought upon the statute of *Rich.* 2. c. 15. for prosecuting of a cause in the admiralty court which did arise upon the land.—It was tried before THE CHIEF JUSTICE in *London*, and a verdict for the plaintiff.

MR. THOMPSON moved in arrest of judgment, For that the action was brought by *original*, in which it was set forth, that the defendant *prosecut. fuit et adhuc prosequitur*, &c. *in Curiâ Admiralitat.* Now the *prosequitur* is subsequent to the original, and so they have recovered damages for that which was done after the action brought.

4. Mod. 152. 1. Salk. 325. Stra. 394. Ld. Ray. 905. 3. Term Rep. 186.

CURIA. These words "*adhuc prosequitur*" must refer to the time of suing forth this original; like the case of a covenant for quiet enjoyment, and a breach assigned, that the defendant built a shed, whereby he hindered the plaintiff that he could not enjoy it *hucusque*,

JOYNER against PRITCHARD.

hucusque, which word must refer to the time of the action brought, and not afterwards.

Judgment was given for the plaintiff.

*[104]

Case 65.

* The King *against* ———

An indictment charging that the defendant *forged* a certain writing obligatory, by which *A.* was *bound*, is repugnant; for if the bond be *forged*, *A.* could not be *bound* by it.

Fitzg. 261. 1. Stra. 18. 2. Stra. 747. 901. 1144. 1. Ld. Ray. 530. 737. 2. Ld. Ray. 921. 1468.

AN INFORMATION was brought against the defendant for forgery, setting forth, that the defendant being a man of ill fame, &c. and contriving to cheat one *A.* did forge *quoddam scriptum*, dated the 16th day of *October*, in the year 1681, *continens in se scriptum obligatorium per quod quidem scriptum obligatorium præd. A. obligatus fuit præd. defend. in quadraginta libris, &c.*— He was found guilty.

And afterwards this exception was taken in arrest of judgment, That the fact alledged in the information was a contradiction of itself; how could *A.* be bound when the bond was forged?— SECONDLY, It is not set forth what that *scriptum obligatorium* was, whether it was *scriptum sigillatum* or not.

CURIA. The defendant is found guilty of the forging of a writing, in which was contained *quoddam scriptum obligatorium*, and that may be a true bond.

Judgment was arrested.

Case 66.

Memorandum.

Powis made Solicitor General in the place of FINCH.

ON *Tuesday April* the 27th SIR THOMAS POWIS, of *Lincoln's Inn*, was made *Sollicitor General*, in the place of MR. FINCH, and was called within the bar.

Case 67.

Hanchet *against* Thelwal.

EJECTMENT.—A special verdict was found, in which the case arose upon the construction of the words in a will.

The testator, being seised in fee, had issue two sons and four daughters: he made his will, and devised his estate (being in houses) by these words: " ITEM, I give and bequeath to my son *Nicholas*

A testator having *two sons* and *four daughters* devises his houses to one of his sons for life; and after his decease, " then I give my estate to my *four daughters*, share and share alike; and if any of them die before marriage, then her part to the rest surviving; and if all my sons and daughters die without issue, then I give my said houses to my sister and her heirs." On the death of *the son* without issue, the four daughters are *tenants in common*; and therefore if one marry and die, leaving issue a son, such son shall come in for his fourth part of the estate.—Ray. 452. Skin. 17. 2. Jones, 172. 2. Show. 136. Pollexf. 434. 2. Vern. 545. 8. Mod. 263. 9. Mod. 57. 10. Mod. 181. 376. 402. 419. 12. Mod. 44. 52. 278. 283. 592. 2. Vern. 449. 536. 545. Gilb. Eq. Rep. 39. 67. 116. 138. Fitz. 23. 104. 112. 117. 314. Cases T. T. 262. Stra. 729. 802. 849. 1. Ld. Ray. 204. 568. 2. Ld. Ray. 873. 1440. Comyns, 82. 372. 542. 3. Peer. Wms. 178. 2. Bl. Com. 192. Cowper, 257. 309. 352. 3. Brown's Cases Chan. 25.

" Price

"*Price* my houses in *Westminster*; and if it please God to take "away my son, then I give my estate to my four daughters "(naming them), share and share alike; and if it please God to "take away any of my said daughters before marriage, then I "give her or their part to the rest surviving; and if all my sons "and daughters die without issue, then I give my said houses to "my sister *Anne Warner*, and her heirs." * *Nicholas Price* entered and died without issue; then the four sisters entered; and *Margaret* the eldest married *Thelwal*, and died, leaving issue a son, who was the lessor of the plaintiff, who insisted upon his title to a fourth part of the houses. * [105]

The question was, What estate the daughters took by this will, whether *joint estates* for life, or several remainders in tail? If only joint estates for life, then the plaintiff, as heir to his mother, will not be entitled to a fourth part; if several remainders in tail, then the father will have it during his life, as tenant by the courtesy.

This case was argued this Term by MR. POLLEXFEN *for the plaintiff*: and in *Hilary Term* following by counsel *for the defendant*.

The plaintiff's counsel insisted, that they took joint estates for life, and this seemed to be the intent of the testator, by the words in his will *(a)*, the first clause whereof was, "I give and bequeath "my houses in *Westminster* to *Nicholas Price*:" now by these words an estate for life only passed to him, and not an inheritance, for there was nothing to be done, or any thing to be paid out of it. The next clause is, "If it please God to take away my son, "then I give my estate to my four daughters, share and share "alike." Now these words cannot give the daughters a fee-simple by any intendment whatsoever; but if any word in this clause seems to admit of such a construction, it must be the word "estate," which sometimes signifies the land itself, and sometimes the estate in the land. But here the word "estate" cannot create a fee-simple, because the testator gave his daughters that estate which he had given to his son before, and that was only for life. Then follow the words "share and share alike;" and that only makes them *tenants in common*. The next clause is, "If "it please God to take away any of my said daughters before mar-"riage, then I give her or their part to the rest surviving *(b)*." These words, as they are penned, can have no influence upon the case.

(*a*) See Reeves *v.* Winnington, ante, 45.

(*b*) See the case of Armstrong *v.* Eldridge, 3. Brown's Cases Chan. 215. where a testator gave a residue to trustees to pay the interest to four persons for life, equally between them, share and share alike; and after the decease of the *survivor*, then to divide the principal to and among all and every their children, share and share alike; it was held, that although the words "equally to be di-"vided," and "share and share alike," are in general construed in a will to create a tenancy in common, yet that here the context shewed a jointenancy to be intended; and therefore, two of the children being dead, it was decreed, that the whole should go to the other two by survivorship.

HANCHET against THELWAL. case. Then follows the last clause, "and if all my sons and "daughters die without issue, then I give, &c." These words create no estate tail in the daughters; for the testator having *two*
* [106] *sons* and *four daughters*, it cannot be * collected by these words how they shall take, and by consequence it cannot be an estate tail by implication. Now suppose one of the daughters should die without issue, it is uncertain who shall have her part; and therefore, there being no appointment in what order this estate shall go, it cannot be an estate tail; and to maintain this opinion this case was cited *(a)*: One *Collier* was seised in fee of three houses, and had issue three sons, *John*, *Robert*, and *Richard*; he devised to each of them a house in fee, proviso if all his children die without issue of their bodies, then the houses to be to his wife. The two eldest sons died without issue, the younger had issue a daughter, who married the lessor of the plaintiff. The question was, Whether by the death of the eldest son without issue, there was a cross remainder to *Richard*, and the heirs of his body; or whether the wife shall take immediately, or expect till after the death of all the sons without issue? And it was adjudged, that the wife shall take immediately, and that there were no cross remainders, nor any estate by implication, because it was a devise to them severally by express limitation. So that if no estate tail arises to the daughters in this case by implication, then it is no more than a devise to his issue *(b)*, which extends to them all, and gives only an estate for life.

1. Ld. Ray. 495. 523. 2. Stra. 969 996.

For the defendant it was argued, that the sons and daughters have an estate tail by implication. It was agreed that *Nicholas* had only an estate for life, and that the word "estate" in this case means the houses, and not the interest in them. It is true, there is no express limitation of any estate to them, but there is an express determination of it. Now if this be not an estate tail by implication, then the words "dying without issue" are void. A devise to his son, and if he die not having a son, then it is devised over, this is an estate tail in remainder *(c)*. It cannot be a doubt who shall take first; for the daughters shall take it, and after them, as it is most natural, the eldest son; for where there is the same proximity of blood, the estate shall go to the eldest *(d)*. As for instance *(e)*, one *Chapman* being seised in fee of two houses, and having three brothers, devised the house which *A.* dwelt in, to his said three brothers; and the house in which his brother *Thomas*
[107] *Chapman* did dwell, he devised to the said * *Thomas*, paying so much, &c. or else to remain to the family of the testator, provided that the houses be not sold, but go to the next of the males, and

(a) Gilbert *v.* Witty, Cro. Jac. 655. 1. Eq. Abr. 190. 2. Roll. Rep. 281. and see the case of Rundale *v.* Eeley, Carter, 173. where this case is cited as good law. See also Dyer, 330. Bendlow, 212. 1. Roll. Abr. 839.

(b) Taylor *v.* Shaw, Cro. Eliz. 742. 1. Eq. Abr. 213. 2. Ander. 134. 1. Vent. 229. Godb. 302.

(c) Newton *v.* Barnardine, Moor, 127.

(d) Dyer, 333.

(e) See the case of Counden *v.* Clarke, Hob. 29. 1. Eq. Abr. 213. Moor, 860.

the

the blood of the males; *Thomas* died without issue; the eldest of the two surviving brothers had issue a daughter, and died: the question was, Whether that daughter or the youngest brother of the testator should have the house? It was adjudged, that the daughter should have it in tail: for the *proviso* that the houses be not sold, &c. made it a tail; and the words "to remain to the "family" must be intended to the eldest. If this be not an estate tail, then the devise over to *Anne Warner* is void. As to the case of *Gilbert v. Witty* (*a*), that moves upon another reason; for there every one took by a distinct and separate limitation. HANCHET against THELWAL.

CURIA. In that case all the estate was limited distinctly to the three sons; but in this it is otherwise, for the testator had two sons, and no estate was limited to one of them before; then he saith, "If all my sons and daughters die without issue, then, &c." and thus the cases differ, which creates the difficulty. But no reason can be given why this Court should not construe wills according to the rules of common law, where an estate by implication is so uncertain; for when men are sick, and yet have a disposing power left, they usually write nonsense, and the Judges must rack their brains to find out what is intended. This cannot be an *estate tail* in the daughters, and therefore the heir must come in for his fourth part.

Judgment for the plaintiff.

(*a*) 1. Eq. Abr. 190. 2. Roll. Rep. 181. Cro. Jac. 655.—See also Carter, 173. where this case is cited, and admitted to be law.

Dixon *against* Robinson.

Case 68.

THIS was a special issue, directed out of chancery, and tried this day at the bar by a *Middlesex* jury.

If the king grant a fair generally, the grantee may keep it where he pleases; or if granted to be held in a town, he may keep it in any place in the town.

The question was, Whether *ballivus*, *probi homines*, *et burgenses burgi de* ANDOVER in *Hampshire* had power to keep a fair at *Weyhill* in any one place where they please? the bill being exhibited to confine the fair to a particular place; which fair was granted to them by charter from *Queen Elizabeth*.

They who would have it confined to a certain place gave in evidence, that *the hospitaller* of *Ewelme*, in *Oxfordshire*, was seised in fee of the manor of *Rambridge*, within which manor the * place was where the fair was always kept, and that the parson of *Andover* had glebe there: that this place was called *Weyhill*, and that the profits did arise by piccage and stallage, to the yearly value of two hundred pounds: that it was an ancient fair held there by prescription before the town of *Andover* had a charter: that upon the late surrender of charters, the town of *Andover* did likewise surrender and took a new charter, in which liberty was given to them to keep this fair in what place they would: that

* [108]

2. Inst. 406. Post. 127. 2. Roll. Abr. 140. 10. Mod. 2. Bac. Abr. 456, 457. 1. Ld. Raym. 149.

DIXON *against* ROBINSON.

both the *hospitaller* and *parson* petitioned the king in council, and obtained an order to try where the fair ought to be kept, which was tried accordingly at the exchequer bar, and a verdict for the parson.

HERBERT, *Chief Justice.* If the fair belong to *Andover*, they may chuse whether they will keep it at any place; and that may create another question, Whether they may not forfeit this franchise by disuse? But certainly if the place be not limited by the king's grant, they may keep it where they please, or rather where they can most conveniently, and if it be so limited, they may keep it in what part of such place they will.

Case 69.

Dawling *against* Venman.

An *action* will not lie for defamation in an affidavit taken in the court of chancery, in a cause there depending.

AN ACTION ON THE CASE was brought against the defendant, for making a scandalous affidavit in *Chancery*, in which were these words: " *Mr. Dawling* is a rogue and a knave, and I will " make it out before my Lord Chancellor, and I will have him " in the pillory." Upon not guilty pleaded, there was a verdict for the plaintiff, and damages entire.

S. C. 2. Show. 446. 1. Roll. Ab. 37. Cro. Eliz. 521. Hutt. 11. 1. Sid. 50. 131. 1. Lev. 119. Owen, 258. Poph. 144. Hard. 221. 1. Leon. 107. 1. Com. Dig. 172. 1. Bac. Abr. 67. 2. Peer. Wms. 406.

It was moved in arrest of judgment, For that the truth of an oath shall not be liable to a trial in an action on the case; for the law intends every oath to be true. Before the statute of *Hen.* 7. c. 3. which gives power to examine perjury, there was not any punishment at the common law for a false oath made by any witness; and therefore an action will not lie for a scandalous affidavit.

Adjournatur (*a*).

(*a*) In S. C. 2. Show. 446. it is said, that the judgment was arrested, because an action will not lie for a false oath in chancery, &c.; and the case of Eyres *v.* Sedgwick, Cro. Jac. 601. and Harding *v.* Bodman, Hutton, 11. referred to as authorities.—See also the case of Cox *v.* Smith, 1. Lev. 119. which seems to admit, that an action will not lie for taking *a false oath*, unless it be the cause of *special damage*.

* [109]

Case 70.

Anonymous.

The release of one defendant in error shall not discharge the rest, although they were all sued jointly and for a personal thing. Post. 135.

AN ACTION of assault and battery and false imprisonment was brought against four defendants: the plaintiff had judgment, and they brought a writ of error.

The plaintiff in the action pleaded the release of one of them, and to this plea all four jointly demur.

THE COURT was of opinion, that judgment might be given severally; for they being compelled by law to join in a writ of error,

1. Roll. Abr. 412. Cro. Jac. 117. 10. Mod. 163. 11. Mod. 254. 12. Mod. 86. 96. 301. 657. Comyns, 539. 1. Ld. Ray. 341. 2. Ld. Ray. 1381. 5. Com. Dig. "Pleader" (3. B. 19.). 1. Bac. Abr. 283.

the

the release of one shall not discharge the rest of a personal thing (*a*). But where divers are to recover in the personalty, the release of one is a bar to all; but it is not so in point of discharge (*b*). If two co-parceners make a lease of a house, and the rent is in arrear, and one of them bring the action and recover, the judgment shall be arrested, because one alone hath recovered in debt for a moiety, when both ought to join (*c*). But it is agreed that if one tenant in common make a lease rendering rent, which afterwards is in arrear, they must join in an action of debt (*d*), because it savours of the personalty. But it is otherwise in case of the realty. ANONYMOUS.

(*a*) 1. Ld. Ray. 244.
(*b*) Ruddock's Case, 6. Co. 25.
(*c*) But see 1. Mod. 102.
(*d*) Lit. sect. 316.

TRINITY TERM,

The Second of James the Second,

IN

The King's Bench.

Sir Edward Herbert, *Knt. Chief Justice.*
Sir Francis Wythens, *Knt.*
Sir Richard Holloway, *Knt.* } *Justices.*
Sir Robert Wright, *Knt.*
Sir Robert Sawyer, *Knt. Attorney General.*
Sir Thomas Powis, *Knt. Solicitor General.*

* Aldridge *against* Duke.

Case 71.

Trespass continued many years, and the statute of Limitations pleaded, the jury gives damages only for the last six years.

S. C. 2. Show. 493.
S. C. Comb. 26[illegible]

ASSAULT, battery, wounding, and imprisoning of him, from the tenth of *August*, 24. *Car.* 2. *usque exhibitionem Billæ*. The defendant pleaded not guilty, *infra sex annos* (*a*). The plaintiff replied, that the writ was sued out the second of *October*, 1. *Jac.* 2.; and that the defendant was guilty within *six years* next before the writ brought. Upon this issue was joined; and a verdict was given for the plaintiff; and entire damages given.

Mr. Pollexfen moved two exceptions in arrest of judgment,

2. Roll. Abr. 549. 1. Sid. 253. 1. Vent. 104. 264. 2. Roll. Rep. 135. 2. Salk. 4[illegible]. 8. Mod. 78. 171. 9. Mod. 32. 10. Mod. 38. 104. 206. 273. 294. 313. 12. Mod. 127. 131. [illegible]. 1. Vern. 73. 256. 456. 2. Vern. 235. 540. 695. Prec. Ch. 518. Gilb. E. R. 41. [illegible]. Fitzg. 81. 1. Ld. Ray. 383. 2. Ld. Ray. 1099. 1. Peer. Wms. 742. 2. Peer. Wms. 144. [illegible]. 3. Peer. Wms. 143. 287. 309. 5. Com. Dig. "Pleader" (3. M. 10).

(*a*) By 21. *Jac.* 1. c. 16. s. 3. "All "actions of trespass, of assault, battery, "wounding, imprisonment, or any of "them, shall be sued within *four years* "next after the cause of such actions "or suit, and not after." And in the case of Blackmore *v.* Tidderley, 2. Salk. 423. where to an action of trespass of assault and battery the defendant pleaded not guilty *infra sex annos*, by mistake, THE COURT after argument, on *demurrer*, held it a bad plea; for there is no such plea at common law; and the directions of the statute must be pursued. S. C. 6. Mod. 240.

Aldridge against Duke.

First, That a verdict cannot help what appears to be otherwise upon the face of the record. * Now here the plaintiff declares, that he was imprisoned the tenth of *August*, 24. *Car.* 2: which is thirteen years since; and being one entire trespass, the issue is found as laid in the declaration; which cannot be for so many years between the cause of action and bringing of the writ; for if a trespass be continued several years, the plaintiff must sue only for the last six years, for which he hath a complete cause of action; but when those are expired, he is barred by the statute.

Secondly, When the plaintiff has any cause of action, then the statute of Limitations begins; as in an action on the case for words, if they be actionable in themselves without alledging special damages, the plaintiff will recover damages from the time of the speaking, and not according to what loss may follow (*a*). So in trover and conversion, when there is a cause of action vested, and the goods continue in the same possession for seven years afterwards; in such case it is the first conversion which entitles the plaintiff to an action. So in the case at bar, though this be a continued imprisonment, yet so much as was before the writ brought is barred by the statute.

Thompson, *contra*. The verdict is good, for the jury reject the beginning of the trespass, and give damages only for that which falls within the six years; and this may be done because it is laid *usque exhibitionem billæ*. If the defendant had pleaded *not guilty* generally, then damages must be for the thirteen years, though the plaintiff on his own shewing had brought his action for a thing done beyond the time limited by the statute; but having pleaded "not guilty at any time within six years," if the verdict find him guilty within that time, it is against him (*b*).

Secondly, As to the objection, that the cause of action arises beyond six years, though it do appear so in the declaration, yet that doth not exclude the plaintiff, for there might have been process out before, or he might be disabled by an outlawry, which may be now reversed; or he might be in prison and newly discharged; from which time he hath six years to begin his action; for being under either of these circumstances, the statute does not hurt him.

Curia. If an action of false imprisonment be brought for seven years, and the jury find the defendant guilty but for two days, it is a trespass within the declaration. * This statute relates to a distinct and not to a continued act, for after six years it will be difficult to prove a trespass; many accidents may happen within that time, as the death, or removal of witnesses, &c.

*[112]

See the case of Coventry v. Apsley, 2. Salk. 420.

Judgment was given for the plaintiff.

(*a*) Saunders v. Edwards, 1. Sid. 95. 160.; Stile v. Finch, Cro. Car. 381.; Hawkins v. Bilhead, Cro. Car. 404.

(*b*) See Thursly v. Warren, Cro. Car.

Dobson

Dobson *against* Thornistone. Case 72.

THE plaintiff was *a husbandman*, who brought an action against the defendant for these words: "He owes more money than "he is worth; he is run away; and is broke:" and he had a verdict.

To say of *a husbandman* or *farmer*, "He owes "more money "than he is "worth, he is "run away and "broke," is actionable. Post. 155.

It was moved now in arrest of judgment, that the words being spoken of *a farmer*, are not actionable. To say that *a gentleman* is "a cozener, a bankrupt, and has got an occupation to deceive "men," though he used to buy and sell, yet, being no *merchant*, it was the better opinion of the Court, that the words were not actionable *(a)*. So to say of *a farmer*, that he is "a whoreson "bankrupt rogue," and it not appearing that he got his living by buying and selling, or that the words were spoken of him relating to his occupation, it is not actionable *(b)*. For it must not only appear that the plaintiff hath a trade (*c*), but that he gets his living by it (*d*), otherwise the words spoken of him will not bear an action.

1. Roll. Ab. 61. 1. Sid. 424. 1. Lev. 276. Cro. Car. 472. Carth. 330. Ray. 184. 207. Cro. Jac. 578. 1. Ld. Ray. 610. 2. Ld. Ray. 1417. 1480.

But THE COURT held the words to be actionable: the like judgment was given in the case of *a carpenter*, in *Michaelmas Term* 3. *Jac*. 2. for words, *viz*. "He is broke and run away."

(*a*) Hilary Term, 28. *Eliz*. in B. R. Godbolt, 40.
(*b*) Phillips *v*. Phillips, Styles, 420.
(*c*) Hawkins *v*. Cutts, Hutt. 49.
(*d*) Emmerson's Case, 1. Sid. 299.

Anonymous. Case 73.

NOTA. Judgment was given upon a demurrer, and a writ of enquiry was awarded; and in the entry thereof upon THE ROLL the words "*per sacramentum duodecim proborum et legalium hominum*" were left out.

The omission of the words, "*upon the oath of* "*twelve good* "*and lawful* "*men*," in entering a *writ of enquiry* on THE ROLL, is amendable after judgment on *demurrer*; and without payment of *costs*. Post. 122.

The question was, Whether it should be amended?

It was said, that *a capiatur* for a *misericordia* shall be amended upon the new statute 16. & 17. *Car*. 2. c. 8. of Jeofails, after *a verdict*, but whether upon *a demurrer*, it was doubted. In a *quo warranto* judgment was entered by *disclaimer*, by the consent of all parties, and the words "*virtute et prætextu literarum patentium* "*geren. dat*. 17. *Jacobi*," were written in the margin * of *the paper book* by the then ATTORNEY GENERAL; but, by reason of a stroke cross them, the clerk omitted them in engrossing the judgment. But, upon a motion, the Court held this amendable at the common law.

* [113]

1. Roll. Abr. 205. 1. Sid. 70. Cro. Car. 184. Carth. 167.

CURIA. The error is only a mis-entry of the writ of enquiry; and it is amendable without payment of costs.

Cro. Eliz. 609. 2. Saund. 289. Stra. 313. 684. 1077. 2. Ld. Ray. 1397. 1587. 12. Mod. 370. 435. 560. 10. Mod. 68. 82. 270. 8. Mod. 234. 375. Comyns, 419. 3. Com. Dig. 335, 336. Andr. 362. Fitzg. 262. 268. 1. Term Rep. 783.

Anonymus. MR. ASTON, *the Secondary*, said, that costs were never paid in this court upon such amendments, nor in the common pleas until my lord CHIEF JUSTICE VAUGHAN's time; but that he altered the practice, and made the rule, that if you amend after a writ of error brought, you must pay *costs*.

Case 74. Holcomb *against* Petit.

The executor or administrator of a *rightful executor* or administrator shall, by the statute 30. *Car.* 2. c. 7. be charged upon a *devastavit* of the testator or intestate.

2. Lev. 110. 133. 3. Leon. 241. 2. Mod. 293. 2. Leon. 188. 2 Vent. 40. 1. Vent. 292. 2. Ch. Cas. 217. Andr. 252. 2. Bac. Abr. 432. 446. 2. Term Rep. 97. 597.

A DEVASTAVIT was brought against an *administrator* of a rightful *executor*: He pleaded an insufficient plea; and there was a demurrer.

The question was upon the statute of 30. *Car.* 2. c. 7. *(a)* the title whereof is, "An act to enable creditors to recover their debts "of the executors and administrators of executors in their *own* "*wrong*," which is introductory of a new law, and charges those who were not chargeable before at the common law; but it enacts, "That all and every the executors and administrators of any per- "son or persons who as executor or executors in his or their own "wrong, or administrators, shall waste or convert any goods, "chattels, estate, or assets of any person deceased, to their own "use, shall be liable and chargeable in the same manner as their "testator or intestate would have been if they had been living."

GOLD held, that he shall not be charged; for where an act of parliament charges an executor, in such case an administrator shall be likewise charged; but if an administrator be charged, that shall never extend to an executor. The rule is, *à majori ad minus valet argumentum, sed non è contra*; therefore the rightful executor shall not be charged by this act, which only makes executors of EXECUTORS *de son tort* liable.

POLLEXFEN *contra*. There can be no reason given why the act should make an administrator of an administrator liable to a *devastavit*, and not an administrator of an EXECUTOR *de son tort*, for the mischief will be the same, and therefore a rightful execu- * [114] tor who wastes the testator's goods ought to be charged. * The recital of this act is large enough; the preamble is general, and the enacting clause expresses "executors and administrators of "EXECUTORS *de son tort*;" but then it also mentions "admini- "strators," but not such who are their ADMINISTRATORS *de son tort*. Now the word "administrator" is in itself a general word, and extends to any one who meddles with the personal estate, so that the preamble being general, and the act remedial, it is within the same mischief.

CURIA. The word "administrator" is very comprehensive; for when an executor pleads, he says *plenè administravit*. If a rightful executor waste the goods, he is a kind of an ADMINISTRATOR *de son tort* for abusing the trust. There is no superiority

(a) Made perpetual by 4. & 5. *Will. & Mary*, c. 24. s. 12.

periority between an executor or an administrator, for by this act they are both equal in power as to the goods of the deceased.

Hopcomb against Petit.

Judgment was given that the *administrator* of the *rightful executor* shall be liable (*a*).

(*a*) By 4. & 5. *Will. & Mary*, c. 24. s. 12. IT IS RECITED, "That as it "was doubted whether the statute "30. *Car.* 2. c. 7. did extend to any "executor or administrator of any executor or administrator *of right*, who "for want of privity in law were not "before answerable, nor could be sued "for the debts due from or by the first "testator or intestate, notwithstanding "that such executor or administrator "had *wasted* the goods and estate of the "first testator or intestate, or converted "the same to his own use;" IT IS ENACTED, "That all and every the executor or administrator of such executor or administrator *of right*, who shall "waste or convert to his own use goods, "chattels, or estate, of his testator or "intestate, shall be liable and chargeable "in the same manner as his testator or "intestate might or should have been." —But in the case of *Hammond v. Gatliffe*, Trinity Term, 12. *Geo.* 2. it is said, THE COURT strongly inclined, that an executor *de son tort* of an executor *de son tort* is not liable for a *devastavit* committed by the first executor *de son tort*, either at the common law or by the statutes; because, by POWELL, *Justice*, the act only says, that the rightful executor or administrator of an executor *de son tort* shall be liable, &c. Andrews, 254. See Bathurst's Case, 2. Vent. 40.

Jenings *against* Hankeys.

Case 75.

BY the statute of 13. *Car.* 2. c. 10, it is enacted, "That they who "kill, course, hunt, or take away red or fallow deer in any "ground where deer are kept, &c. or are aiding therein, if con-"victed by confession, or oath of one witness, before one justice "of the peace, within six months after the offence done, shall "forfeit twenty pounds, one moiety to the informer, the other "to the owner of the deer, to be levied by distress by warrant "under the justice's hand (*b*)."

The informer under a penal statute, who is intitled to a part of the penalty, cannot be a witness against the offender.

1. Ld. Ray. 396. 731. 744. 2. Ld. Ray. 1545. 2. Vern. 317. 375. 10. Mod. 156. 12. Mod. 339. 512. 1. Stra. 316. 595. 633. 2. Stra. 728. 828. 1182. 1229.

The defendant was convicted by the oath of the informer.

MR. SHOWER moved that it might be quashed, because the informer is not to be admitted as a witness, he being to have a moiety of the forfeiture. The parties to an usurious contract shall not be admitted as an evidence to prove the usury, because he is *testis in propriâ causâ*, and by their oath may avoid their own bonds (*c*).

MR. POLLEXFEN, *contra*. The statute gives power to convict by the oath of a credible witness, and such is the informer.

(*b*) But see 9. *Geo.* 1. c. 22. the 5. *Geo.* 1. c. 28, and the 16. *Geo.* 3. c. 30.; by which last statute the 13. *Car.* 2. c. 10. is repealed, and other provisions made upon this subject. 1. Hawk. P. C. 189. and Cases in Crown Law. —See also Co. Lit. 6. 2. Ray. 191. 1. Vent. 49. Hard. 331. 1. Salk. 285. 1. Stra. 498. 633. 2. Stra. 1043. 3. Wilf. 262. 1. Hawk. P. C. 533. 2. Hawk. P. C. 610. and the cases of Abraham v. Bunn, 4. Burr. 2256, and Fitzroy v. Gwillim, 1. Term Rep. 153.

(*c*) 12. Co. 68. 2. Roll. Abr. 685.

Jenings *against* Hankeys

* It is not a material objection to say, that the informer shall not be a witness because he hath a moiety of the forfeiture, for in cases of the like nature the informer is always a good witness. As upon the statute for suppressing of conventicles the informer is a good witness, and yet he hath part of the penalty; for otherwise that act would be of little force; for if he who sees the people met together be not a good witness, nobody else can.

Curia. In the statute of Robberies a man swears for himself because there can be no other witness; he is a good witness *(a)*.

(a) But see the case of Rex v. Stone, where a conviction on this statute for killing fallow deer was quashed, because the informer was the witness; and it was said, that divers convictions had been quashed for the same reason before, 2. Ld. Ray. 1545.; and it appears by another report of the same case, that this case of Jennings v. Hankey was cited in the argument. S. C. 1. Sess. Cases, 378. See Rex v. Piercy, Andr. 18.; Rex v. Tilly, Stra. 316. Cas. T. Hardw. 170. to the same effect; and Rex v. Blaney, Andr. 240. where a conviction founded on the evidence of the informer only was quashed, and the above case denied to be law. See also Boscawen on Convictions, 69.

Case 76. Harman *against* Harman.

Trinity Term, 1. *Jac*. 2. *Roll* 181.

To debt on bond an executor may plead a *judgment recovered* on a simple contract; for unless he had *notice* of the bond it is no *devastavit* to pay such debt on simple contract.

S. C. Comb. 35. S. C. 2. Show. 492. 3. Lev. 114. 5. Co. 83. Fitzg. 77. 1. Vern. 143. 203. 457. 2. Vern. 37. 88. 101. 202. 220. Prec. Chan. 188. 534. 10. Mod. 428. 405. 11. Mod. 45. 12. Mod. 291. 153. 527. 1. Peer. Wms. 295. 2. Peer. Wms. 296. 447. 3. Peer. Wms. 222. 400. Cases T. T. 217. 2. Stra. 407. 732. 2. Stra. 1028. 1. Ld. Ray. 786. 2. Ld. Ray. 1391. Rich on Wills, 379. Bull. N. P. 178. 3. Com. Dig. "Pleader" (2. D. 9.). 1. Term Rep. 690.

DEBT upon a bond against an administrator, who pleaded "fully administered," and that he had not notice of this bond before such a day; and a special verdict was found.

The question was, Whether notice is necessary to be given of debts of an inferior nature?

The Court gave no opinion. But they agreed that a judgment upon a simple contract may be pleaded in bar to an action of debt upon a bond; and that it is no *devastavit* in an executor to pay a debt upon such a contract before a bond debt, of which he had no notice *(b)*. So where an obligor did afterwards enter into a recognizance in the nature of a statute, and judgment was against him upon the bond, and then he died; his executrix paid the creditor upon the statute, and the obligee brought a *scire facias* upon the judgment on the bond debt, and she pleaded payment of the recognizance; this was held a good plea (c), for she is not bound to take notice of the judgments against the testator with-

(b) Vaugh. 94.
(c) 2. Ander. 159. 1. Mod. 174. 3. Lev. 114.

out

out being acquainted therewith by his creditors, for she is in no wise privy to his acts (*a*). HARMAN *against* HARMAN.

(*a*) It is said, S. C. Comb. 35. that in Michaelmas Term 3. *Jac.* 2. it was adjudged for the plaintiff; but S. C. 2. Show. 492. says, the case was *adjourned*. It seems, however, from both the reports, that THE COURT were of opinion, that where the payment of a simple contract debt is *compulsive*, it is a good payment without notice, but not where the payment of such a debt is *voluntary*. Therefore, in the case of Davis *v.* Markhouse, an executor, to an action of debt on bond, pleaded *a judgment recovered* against him on a simple contract debt, and upon demurrer the plea was held good, Fitzg. 76.; for otherwise an obligee might ruin an executor by keeping the bond in his pocket; and he ought to give notice of it. S. C. Buller's N. P. 178. But in *Sawyer v. Mercer*, 1. Term Rep. 690. where in debt on bond the defendant as administrator pleaded a *judgment confessed*, on the preceding day, in a simple contract, and did not aver that he had no notice of the plaintiff's demand, THE COURT were clearly of opinion, that the plea was bad; that it was directly contrary to all the precedents on the subject; and if permitted would overturn the whole order of administration; for it would enable an administrator in many cases to defeat a specialty creditor, by *confessing* as many judgments as he pleased on simple contract debts.

MICHAELMAS TERM,

The Second of James the Second,

IN

The King's Bench.

Sir Edward Herbert, *Knt. Chief Justice.*

Sir Francis Wythens, *Knt.*
Sir Richard Holloway, *Knt.* } *Justices.*
Sir Robert Wright, *Knt.*

Sir Robert Sawyer, *Knt. Attorney General.*

Sir Thomas Powis, *Knt. Solicitor General.*

* Anonymous. Case 77.

If perjury be assigned in a deposition taken before commissioners in chancery, the return of the commissioners, that the deponent made oath before them, is not sufficient to prove the identity of the defendant.

AN INFORMATION was exhibited against the defendant for *perjury*, setting forth that a *bill in chancery* was exhibited by one *A. B.* and the proceedings thereon. The perjury was assigned in *a deposition* made by the defendant on the thirtieth day of *July*, 1683, and taken in that cause before *commissioners* in the country. It was tried this day at THE BAR.

The question was, Whether the return of the commissioners, that the defendant made oath before them, is sufficient evidence to convict him of perjury, without their being present in court to prove him the very same person?

10. Mod. 74. 108. 194. 12. Mod. 511. 1. Stra. 545. 1. Ld. Ray. 451. 2. Ld. Ray. 893. 936. 1221. 3. Peer. Wms. 196.

PEMBERTON, *Serjeant*, *for the defendant*, admitted that an information will lie in this case against him, but the commissioners must be here, or some other person, to prove that he was the person who made oath before them. The commissioners sign the depositions, and they ought to produce them so signed to the Court, and prove it, for depositions are often suppressed by order of the Court. If a true copy of an affidavit made before the Chief Justice of this court be produced at a trial, it is not sufficient to convict a man of perjury. This is not like the case of perjury assigned in an answer in chancery taken in the country, for that

he

ANONYMOUS. is under the party's hand, but here is nothing under the defendant's hand; and therefore the commissioners ought to be in the court to prove him to be the man.

*[117] * THE COURT were equally divided.

THE CHIEF JUSTICE and WYTHENS, *Justice*, were of opinion that it was not evidence to convict the defendant of perjury: it might have been otherwise upon the return of *a Master of Chancery*, for he is upon his oath, and is therefore presumed to make a good return; but *commissioners* are not upon oath; they pen the depositions according to the best of their skill; and a man may call himself by another name before them without any offence. The commissioners cannot be mistaken in the oath, though they may not know the person; for this Court may be so mistaken in those who make affidavits here, but not in the oath: if the commissioners, or the clerk to the commission, had been here, they would have been good evidence. If an affidavit be made before a *justice of the peace* of a robbery, as enjoined by the statute, if you will convict the person of perjury, you must prove the swearing of the affidavit (*a*).

The ATTORNEY GENERAL may enter a *nolle prosequi* after the jury are sworn.

THE ATTORNEY GENERAL, perceiving the opinion of the Court, rather than the plaintiff should be non-suit because no evidence could be given, offered to enter a *nolle prosequi*, which the Court said could not be done, because the Jury were sworn; but he insisted upon it, and said he would cause it to be entered.

Co. Lit. 139. Hard. 504. Salk. 455. 11. Mod. 56. 12. Mod. 647. 10. Mod. 152. Ld. Ray. 721. Cowp. 611. Dougl. 239.

(*a*) No return of *commissioners*, or of a *master in chancery*, of the party's swearing, will be sufficient, without some other proof of the identity of the person, Bull. N. P. 239.; but positive proof that the defendant was sworn, made by any person acquainted with him, is sufficient, Bull. N. P. 239. In perjury in an answer in the exchequer, the answer was allowed to be read on proving the hand of *the baron* and *the defendant*, Theory of Evid. 102. 2. Stra. 1043. *in marg.* So also in perjury in an answer in chancery, proving the name subscribed to be the hand-writing of the defendant, and the master in chancery proving that he subscribed the jurat, as being sworn before him, is sufficient proof of the identity of the defendant, and that he swore the answer. Rex *v.* Morris, 2. Burr. 1189.

Case 78.

Sir John Knight's Case.

An *information* lies, both at common law and on the statute 2. *Edw.* 3. c. 3. for going armed, to the terror of the people.

AN INFORMATION was exhibited against him by THE ATTORNEY GENERAL, upon the statute of 2. *Edw.* 3. c. 3. which prohibits "all persons from coming with force and arms "before the king's justices, &c. and from going or riding armed "in affray of peace, on pain to forfeit his armour, and suffer im- "prisonment at the king's pleasure." This statute is confirmed by that of 20. *Rich.* 2. c. 1. with an addition of a farther punishment, which is to make a fine to the king.

Comb. 38. Dalton, 130. F. N. B. 249. 2. Bulst. 330. Cromp. 64. Fitzg. 47. 65. 10. Mod. 121. 158. 409. 1. Ld. Ray. 347. 682. 2. Ld. Ray. 1039. 2. Stra. 828. 1. Hawk. P. C. 267. Hawk. P. C. 369.

The

The information sets forth, that the defendant did walk about the streets armed with guns, and that he went into the church of *St. Michael*, in *Bristol*, in the time of divine service, with a gun, to terrify the king's subjects, *contra formam statuti*. SIR JOHN KNIGHT'S CASE.

This case was tried at the bar, and the defendant was acquitted (*a*).

* THE CHIEF JUSTICE said, that the meaning of the statute of 2. *Edw*. 3. c. 3. was to punish people who go armed to terrify the king's subjects. It is likewise a great offence at the *common law*, as if the king were not able or willing to protect his subjects; and therefore this act is but an affirmance of that law; and it having appointed a penalty, this Court can inflict no other punishment than what is therein directed. * [118]

(*a*) But on the motion of the attorney general he was bound to his good behaviour.

HILARY TERM,

The Second and Third of James the Second,

IN

The King's Bench.

Sir Edward Herbert, *Knt. Chief Justice.*
Sir Francis Wythens, *Knt.*
Sir Richard Holloway, *Knt.* } *Justices.*
Sir Thomas Powell, *Knt.*
Sir Robert Sawyer, *Knt. Attorney General.*
Sir Thomas Powis, *Knt. Solicitor General.*

* Kingston *against* Herbert. Case 79.

A *scire facias* ought to go to the *terre-tenants* before a common recovery is reversed, because the errors of a recovery ought not to be examined without all the parties interested being in court; but the granting of this writ is discretionary.

A COMMON RECOVERY was suffered in the twenty-second year of *James the First*, and a writ of error was brought about five years since to reverse it, and judgment was given for the reversal.

It was now moved to set aside that reversal, because there was no *scire facias* against the *terre-tenants.*

MR. WILLIAMS, who argued *for the reversal*, said, that the want of a *scire facias* must be error, either *in law* or *in fact*; it cannot be error in law, for that must appear upon the record itself, which it doth not here; it cannot be error in fact, because there is no necessity of such a writ; it is only discretionary in the Court, and not *ex necessitate juris* (a).

S. C. Comb. 42. S. C. 2. Show. 505.

But *on the other side* it was insisted, that the Court cannot proceed to examine errors before a *scire facias* is awarded to the *terre-tenants*, for they may have a matter to plead in bar to the writ; as

Post. 274. Cro. Jac. 506. Carth. 111. Skin. 273. Dyer, 320. 331. Holt, 616. 10. Mod. 43. 125. 179. 245. 436. 12. Mod. 407. 2. Ld. Ray. 1256. Cruise on Recov. 290. 4. Bac. Abr. 418. 1. Burr. 361.

(a) See THE YEAR BOOKS 27. *Hen.* 6. Cru. Car. 295. Cro. Eliz. 896. Moor, 135. 1. *Edw.* 2. 242. 3. Co. 13. 524. 2. Vent. 104.

a release,

KINGSTON *against* HERBERT.

a release, &c. *(a)* and the party cannot be restored to all which he hath lost by the suffering of the recovery, unless the defendant be brought in upon the *scire facias*.

CURIA. The only question is, Whether this judgment be well given without a *scire facias?* The Secondary hath reported that the practice is so. Then as to the objection, that such a *scire facias* is not *ex necessitate juris*, but only discretionary, it is quite otherwise; for it is not only a cautionary writ, as all other *scire facias*, but it is a legal caution, which in a manner makes it

*[120] necessary. * It is true, if there had been a judgment corruptly obtained, this Court might have set it aside; but if *erronicè*, it is a doubt whether it may be vacated but according to the forms and methods of law.

Adjournatur (*b*).

(*a*) See 1. Burr. 362.

(*b*) In S. C. Comb. 42. it is said, that the reversal of the recovery was vacated, though the Court was of opinion, that the awarding a *scire facias* to the *terre-tenants* was not *ex necessitate*, but discretionary, S. C. 2. Show. 505. It is, however, the course of the Court to award *scire facias* against both the *terre-tenant* and *the heir*, Dyer, 321. 1. Sid. 213.; because the errors upon a common recovery should not be examined before all the parties interested in supporting it are in court, Post. 274. Pembroke's Case, Holt, 614. Skin. 573. 4. Bac. Abr. 418. Salk. 40. 679. 6. Mod. 134.; but although by the *established method* of proceeding there *must* be a *scire facias* against the *terre-tenants*, yet the omission of it is only *irregularity*. Hall *v.* Woodcock, 1. Burr. 360.

Case 80.

Baldwin *against* Flower.

An action lies for saying of a man's wife, "She "is a *whore*; "she is my "whore;" and being brought by husband and wife may conclude *ad damnum ipsorum*.

HUSBAND AND WIFE brought an action on the case for words spoken of the wife.—The declaration was, that the defendant having some discourse with another person, called the wife "Whore," and said that "she was his whore;" and concluded *ad damnum ipsorum, &c.* The plaintiff had a verdict.

It was now moved in arrest of judgment, For that the words were not actionable without alledging *special damage*.

8. Mod. 341. 370. 10. Mod. 162. 385. 11. Mod. 48. 140. 208. 12. Mod. 106. 142. 633. 1. Stra. 61. 229. 666. 2. Stra. 977. 1200. 1. Ld. Ray. 710. 2. Ld. Ray. 1004. 1032. Comyns, 552.

But it was answered, that the action was well brought. To say "He is rotted with the pox" is actionable, without alledging *special damage*, because the person by such means will lose the communication and society of his neighbours (*c*). As to the conclusion *ad damnum ipsorum* it is good, for if she survive the husband the damages will go to her; and so are all the precedents (*d*).

CURIA. The words are actionable.

(*c*) 1. Roll. Abr. 35. Moor, 10. Cro. Eliz. 582. 1. Sid. 61. 241. 2. Mod. 196. 296. Cro. Jac. 473. Cro. Car. 436. Salk. 693. 696. 2. Term Rep. 473.

(*d*) Cro. Jac. 473. 644. 2. Roll. Rep. 250. 9. Mod. 341. Comb. 184. 1. Salk. 114. 1. Sid. 387. Palm. 339. 5. Com. Dig. "Pleader" (2. A. 1.). 3. Bac. Abr. 581.

And

And THREE JUSTICES were of opinion, that the conclusion of the declaration was as it ought to be; which WYTHENS, *Justice*, denied; for if an inn-keeper's wife be called "a cheat," and the house lose the trade, the husband has an injury by the words spoken of his wife, but the declaration must not conclude *ad damnum ipsorum.* BALDWIN *against* FLOWER.

Sir Thomas Grantham's Case.

Case 81.

Homine replegiando lies for a baptized infidel detained from his master.

Ray. 475. 1. Sid. 210.

HE bought a monster in the *Indies*, which was a man of that country, who had the perfect shape of a child growing out of his breast as an excrescency, all but the head. This man he brought hither, and exposed to the sight of the people for profit. The *Indian* turned *Christian* and was baptized, and was detained from his master.

The master brought a *homine replegiando*. *[121]

Return to a *homine replegiando.*

The sheriff returned, that he had replevied the body, but did not say, the body in which *Sir Thomas* claimed a property; where- * upon he was ordered to amend his return.

And then THE COURT of Common Pleas bailed him.

Banson *against* Offley.

Case 82.

On an appeal of murder charging that *A.* gave the mortal wound, and that *B.* was present aiding and assisting, a verdict finding that *B.* gave the wound, and that *A.* was present and assisting, is good.

AN APPEAL OF MURDER was tried in *Cambridgeshire* against three persons; and the count was, that *Offley* assaulted the husband of the appellant, and wounded him in *Huntingdonshire*, of which wound he languished and died in *Cambridgeshire*, and that *Lippon* and *Martin* were assisting.

THE JURY found a special verdict, in which the fact appeared to be, that *Lippon* gave the wound, and that *Martin* and *Offley* were assisting.

S. C. Comb. 45. S. C. 2. Show. 510. S. C. 3. Salk. 38. Staunf. 41. Plowd. 98. 9. Co. 67. 1. Ld. Ray. 21. 43. 556. 11 Mod. 70. 1. Salk. 334. Gilb Evid. 271. 1 Hale, 437. 2. Hale, 185. 292. 344. See 2. Hawk. P. C. 617.

THE FIRST EXCEPTION to this verdict was, That the count and the matter therein alledged must be certain, and so likewise must the verdict, otherwise no judgment can be given; but here the verdict finding that another person gave the stroke, and not that person against whom the appellant had declared, it is directly against her own shewing.

SECOND EXCEPTION. This fact was tried by a jury of *Cambridgeshire*, when it ought to have been tried by a jury of both counties.

THE COURT answered to the first exception, that it was of no force, and that the same objection may be made to an indictment, where in an indictment if one give the stroke and another is abetting, they are both principally and equally guilty; and an indictment ought to be as certain as a count in an appeal.

Douglas 210.; the case of Simms and Merryweather, cited in Royce's Case, 4. Burr. 2076; the Coalheavers Case, Cases in Crown Law, 61.; and the case of Taylor v. Shaw, Cases in Crown Law, 290.

As

An indictment or appeal of murder, when the mortal blow is given in one county, and the party dies in another, may be tried by a jury of the county in which the death happened.

As to THE SECOND EXCEPTION, it is a good trial by a jury of *Cambridgeshire* alone, and this upon the statute of 2. & 3. *Edw.* 6. c. 24. the words of which are, *viz.* " Where any person, &c. shall hereafter be feloniously stricken in one county, and " die of the same stroke in another county, that then an indictment thereof found by the jurors of the county where the death " shall happen, whether it be found before the coroner upon the " sight of the body, or before the justices of the peace, or other " justices or commissioners who shall have authority to enquire " of such offences, shall be as good and effectual in the law as " if the stroke had been in the same county where the party shall " die, or where such indictment shall be found." It is true, that at the common law if a man had received a mortal wound in one county, and died in another, the wife * or next heir had their election to bring an appeal in either county, but the trial must be by a jury of both counties. But now that mischief is remedied by this statute, which doth not only provide that an appeal shall be brought in the county where the party died, but that it shall be prosecuted, which must be to the end of the suit.

* [122]

Staund. 63. Dyer, 46. 7. Co. 2. 4. Inst. 49. Yelv. 12. Cro. Car. 247.

Adjournatur (*a*).

(*a*) The Court was clear on these exceptions, and inclined to give judgment; but on other errors being mentioned, the case was adjourned. S. C. Comb. 45.

Case 83.

The King *against* Hinton and Brown.

An indictment for subornation of perjury must state what the perjury was, and shew, by setting forth the *oath*, that it was actually committed.

AN INDICTMENT was brought against the defendants, setting forth, that *a conventicle* was held at a certain place, and that they " moved, persuaded, and suborned" a certain person to swear that several men were then present, who really were, at that time, at another place. They were found guilty; and a writ of error was brought to reverse the judgment.

The error assigned was, That the indictment does not set forth that any *oath* was made, so that it could not be subornation. There is a difference between persuading a man to swear falsely and subornation itself, for an indictment for subornation always concludes *contra formam statuti*.

1. Roll. Abr. 41. 57. Yelv. 72. Cro. Jac. 58. Cro. Car. 337. 7. Mod. 101. 12. Mod. 139. Fitzg. 262. 266. 1. Stra. 70. 442. 1. Ld. Ray. 887. 2. Ld. Ray. 1221. 1305. 1. Hawk. P. C. 325. 3 Bac. Abr. 814.

CURIA. It is not enough to say that a man suborned another to commit a perjury, but he must shew what perjury it is, which cannot be without an oath; for an indictment cannot be framed for such an offence, unless it appear that the thing was false which he was persuaded to swear. The question therefore is, If the person had sworn what the defendants had persuaded him to do, whether that had been perjury? There is a difference when a man swears a thing which is true in fact, and yet he doth not know it to be so, and to swear a thing to be true which is really false; the first is perjury before God, and the other is an offence of which the law takes notice.

But

'But the indictment was quashed, because the words *per sacramentum duodecim proborum et legalium hominum* were left out.

Indictment quashed for want of "*pro-*

"*borum et legalium hominum.*"—2. Roll. Abr. 82. 1. Keb. 629. Cro. Eliz. 751. Cro. Jac. 635. Poph. 202. 1. Lev. 208. 1. Sid. 106. 367. Ld. Ray. 592. 609. But see 2. Hawk. P. C. ch. 25. f. 17. where it is said, that the omission of these words is no exception to an indictment found in the king's bench, or grand sessions, or county palatine, and that it hath been often over-ruled as to indictments in other courts; because all men shall be intended to be *honest and lawful* until the contrary appear.

They held, that if the return had been right upon the file, the record should be amended by it.

Amendment.

Ante, 112.

* Blaxton *against* Stone.

Case 84.

THE case was this: A man seised in fee, &c. had issue two sons; he devised all his *land* to his eldest son, and if he die without heirs males, then to his other son in like manner.

The question was, Whether this was an *estate tail* in the eldest son?

Curia. It is plain the word "body," which properly creates an estate tail, is left out; but the intent of the testator may be collected out of his will, that he designed an estate tail; for without this devise it would have gone to his second son, if the first had died without issue. It is therefore an estate tail *(a)*.

A devise of all the testator's land to his eldest son and his heirs, and if he die without *heirs male*, then to his second son in like manner, passes only an *estate in tail.*

S. C. Skin. 269. Cro. Car. 57. Vaugh. 270. 1. Roll. Rep. 399. 8. Mod. 59. 123. 263. Cases T. T. 2. 2. Vern. 546. Comyns, 82. 372 539. 542. 1. Peer. Wms. 23. Stra. 802. 1. Ld. Ray. 204. 568. 2. Ld. Ray. 873. 1440.

(*a*) S. C. Skin. 269. says, "It was adjudged an estate-tail; but it was not argued or defended by the other side, *ideo quære*." But the rule of law seems clearly settled, that when a testator devises to "*A.* and his heirs" generally, it conveys an *estate in fee*; but that if, in such a devise, there be a *limitation* over for want, or upon failure of, such heirs, to any person who may be *his* heir, the word "heirs" is restrained to "heirs of the body," and the devisee takes only an *estate tail*. See Morgan *v.* Griffiths, Cowp. 234.; Denn *v.* Shenton, Cowp. 410.; Hodgson *v.* Ambrose, Dougl. 337. Dougl. 506, 507. *notis*; Goodright *v.* Durham, Dougl, 264.; Blanford and Dymock *v.* Applin, 4. Term Rep. 82.; James *v* Hay and Others, 4. Term Rep. 605. But where the testator devised to his son *A.* his heirs and assigns for ever, and if he die *leaving no issue behind him* then over, it was held, that *A.* took an estate in *fee simple*; and that the limitation over was good by way of *executory devise*, Porter *v.* Bradley, 3. Term Rep. 145. So also under a devise to *A.* and his heirs, but if he die without settling or disposing of the same, or without issue, then over, *A.* may settle the estate in his life-time, and defeat the limitation over, Beachcroft *v.* Broome, 4. Term Rep. 441.

EASTER TERM,

The Third of James the Second,

IN

The King's Bench.

Sir Edward Herbert, *Knt. Chief Justice.*

Sir Francis Wythens, *Knt.*
Sir Richard Holloway, *Knt.* } *Justices.*
Sir Thomas Powel, *Knt.*

Sir Robert Sawyer, *Knt. Attorney General.*
Sir Thomas Powis, *Knt. Solicitor General.*

Case 85.

* The King *against* William Beal.

Saturday, April 15, 1687.

Execution of a felon cannot be awarded into a different county from that in which he was tried and convicted, except the record of attainder be removed into the king's bench, and then it may be ordered in the county where the Court sits.

S. C. 2. Show. 511.
Cro. Car. 176.
Cro. Jac. 495.
Hutt. 21.
1. Lev. 62.

MR. ATTORNEY moved, that this Court would award execution upon the defendant, who was a soldier, for deserting of his colours, and was condemned for the same at the assizes at *Reading* in *Berks*, and reprieved, and that he might be executed at *Plymouth*, where the garrison then was.

THE CHIEF JUSTICE, in some heat, said, that the motion was irregular, for the prisoner was never before the Court.

MR. ATTORNEY then moved for a *habeas corpus*; and on *Tuesday April* the 18th the soldier was brought to the bar, and MR. ATTORNEY moved it again.

But it was affirmed by HERBERT, *Chief Justice*, and WYTHENS, *Justice*, that it could not be done by law; for the prisoner being condemned in *Berks*, and reprieved by the Judge to know the king's pleasure, and now brought hither, cannot be sent into another county to be executed; it may be done in *Middlesex* by the prerogative of this court which sits in that county, but no where

* 1. Sid. 72. 8. Mod. 94. 10. Mod. 250. 344. 12. Mod. 156. 1. Stra. 530. 1. Ld. Ray. [illegible] 2. Hawk. P. C. 656. Cowp. 726.

 else

THE KING *against* WILLIAM BEAL.

else but in the proper county where the trial and conviction was: So the prisoner was committed to the *King's Bench*, and the record of his conviction was not filed.

*[125] * But it was the king's will, that this man should be executed at *Plymouth*, where the garrison was, that by this example other soldiers might be deterred from running from their colours.

SIR ROBERT WRIGHT, who was made Chief Justice of the *Common Pleas* in the room of SIR HENRY BEDDINGFIELD, who died the last Term (as he was receiving of the sacrament), was on *Friday* following, being the 21st of *April*, made Chief Justice of this court in the place of SIR EDWARD HERBERT, who was removed into the *Common Pleas*, and made Chief Justice there; and SIR FRANCIS WYTHENS had his *quietus* the night before.

The same 21st day of *April*, after this removal, the soldier was brought again to the bar, and upon the motion of MR. ATTORNEY was ordered by the new CHIEF JUSTICE to be executed at *Plymouth*, which was done accordingly.

EASTER TERM,

The Third of James the Second,

IN

The King's Bench.

Monday, May 2, 1687.

Sir Robert Wright, *Knt. Chief Justice.*
Sir Richard Holloway, *Knt.* }
Sir Thomas Powel, *Knt.* } *Justices.*
Sir Richard Allibon, *Knt.* }
Sir Robert Sawyer, *Knt. Attorney General.*
Sir Thomas Powis, *Knt. Solicitor General.*

Anonymous. Case 86.

NOTA.—A writ of error was brought upon a judgment given in this court returnable in parliament, which was prorogued from the 28th day of *April* to the 22d day of *November* following.

Quære, If a writ of error in parliament be a *supersedeas* to the execution, when a Term intervenes between the [illegible] and the ret[illegible] *proro-gation*.

SIR GEORGE TREBY moved, that it might be discharged; for it could not be a *supersedeas* to this execution, because there was a whole Term which intervened between the *teste* and the *return* of the writ of error, *viz. Trinity Term.*

On the other side, it was said, that the proclamation was no record; it only shews the present intention of the king, which he may recal at any time.

1. Vent. 31. 266.
1. Sid. 413.
2. Lev. 93.
2. Leon. 120.
Bunb. 64.
11. Mod. 113.

But THE COURT made no rule.

12. Mod. 604. 1. Peer. Wms. 685. 1. Term Rep. 279. 3. Term Rep. 390.

TRINITY TERM,

The Third of James the Second,

IN

The King's Bench.

Sir Robert Wright, *Knt. Chief Justice.*
Sir Richard Holloway, *Knt.* } *Justices.*
Sir Thomas Powel, *Knt.* } *Justices.*
Sir Richard Allibon, *Knt.* } *Justices.*
Sir Robert Sawyer, *Knt. Attorney General.*
Sir Thomas Powis, *Knt. Solicitor General.*

*[126]

* The Company of Merchant Adventurers *against* Rebow. Case 87.

The king cannot by his charter grant to a society of merchants the exclusive privilege of trading to particular places, and in particular articles, unless he is previously authorised by parliament so to do.

IN A SPECIAL ACTION ON THE CASE, the plaintiffs declared, That in the reign of *Henry the Fourth* there was a society of merchants adventurers in *England*, and that afterwards *Queen Elizabeth* did by her letters patents incorporate them by the name of "The Governor and Company of the Merchants Adventurers, "&c." and gave them privilege to trade into *Holland*, *Zealand*, *Flanders*, *Brabant*, the country belonging to the *Duke of Lunenburgh*, and *Hamburgh*, prohibiting all others not free of that company; by virtue whereof they did trade into those parts, and had thereby great privileges and advantages; that the defendant, not being free of the said company, did trade into those parts without their authority, and imported goods from thence into this kingdom, *ad damnum*, *&c.*

S. C. Comb. 53. Ante, 75. Skin. 361. 11. Co. 87. 1. Roll. Rep. 4. 8. Co. 125. Lut. 564. 2. Ro. Rep. 114.

The defendant pleaded as to *Hamburgh* not guilty, and as to the other places he pleaded the statute of 15. *Edw.* 3. c. 3. "That the seas shall be open to all merchants to pass with their "merchandize whither they please."

Hard. 55. 108. 1. Mod. 18. 4. Mod. 176. 1. Vent. 47. Skin. 132. 165. 334. 2. Ch. Cas. 165. Vern. 307. 2. Atk. 484. 1. Hawk. P. C. 470. 5. Com. Dig. 567. 3. Bac. Abr. 627. Bac. Abr. 168.

THE COMPANY OF MERCHANT ADVENTURERS *against* REBOW.

* The plaintiff demurred; and the defendant joined in demurrer.

This case was now argued by counsel on both sides.

THE COUNSEL *for the plaintiff* in their arguments made these points.

FIRST, What power the king had by his prerogative to restrain his subjects from trading to particular places?

SECONDLY, Admitting he had such a prerogative, whether an action on the case will lie?

As to THE FIRST POINT it was said, that all trades must be under some regulation, and that the subject hath not an absolute power to trade without the leave of the king; for it is said in our books, "*omnes mercatores nisi publicè prohibiti fuerint habeant* "*salvum et securum conductum*," which is meant of merchants strangers in amity with us, and "*nisi publicè prohibiti*" must be by the king (*a*). Now if merchants strangers may be prohibited from coming into *England*, by the same reason the king's subjects may be restained from going out of the kingdom; and for that purpose the writ of *ne exeat regnum* was framed, which is grounded upon the common law, and not given by any particular statute (*b*). The king's prerogative in this and such like cases is so much favoured by law, that he may by his *privy seal* command any of his subjects to return out of a foreign nation, or seize their lands (*c*). The first statute which regulates trade is 27. *Edw*. 3. c. 1. which confined *the staple* to certain places, that persons might not go about in companies to trade without the king's licence; and from thence came *markets*; and if such were kept without the king's grant, a *quo warranto* would lie against them who continued it, and the people who frequented those markets were punishable by fine (*d*). The law is plain, that the king is sole judge of the place where markets shall be kept; for if he grant one to be kept in such a place which may not be convenient for the country, yet the subjects can go to no other; and if they do, the owner of the soil where they meet, is liable to an action at the suit of the grantee of the market (*e*). * A custom to restrain a man from the exercising of his trade in a particular place hath been adjudged good; as to have a bake-house in such a manor, and that no other should use that trade there (*f*). And as a man may be restrained by custom, so he may restrain himself from using of a trade in a certain place; as if he promise upon a valuable consideration not to use

12. Mod. 562. Cases T.T. 196. 2. Peer. Wms. 263. 3. Peer. Wms. 313.

*[128]

(*a*) Magna Charta, cap. 30. 2. Inst. 57.

(*b*) Fitz. Nat. Brev. 85. 3. Inst. 179.

(*c*) Carter's Case, 1. Leon. 9.; and see Tresham s Case, Moor, 172.

(*d*) 2. Bac. Abr. 455 But see 3. & 4. *Will. & Mary*, c. 18. and 9. *Ann*. c. 20.; Rex *v*. Marsden, 1. Black. Rep. 579. that informations in nature of *quo warrantos* are never granted for markets or fairs, unless where tolls are claimed. S. C. 4. Burr. 1812.

(*e*) Fitz. Nat. Brev. 125. 2. Roll. Abr. 140. 2. Bac. Abr. 450. 10. Mod. 355. Ante, 108.

(*f*) Sir George Farmer's Case, cited in 8. Co. 127.

the

the trade of a mercer in ſuch a place (a). And it is very neceſſary that trade ſhould in ſome meaſure be reſtrained ſo as to be managed only by freemen, becauſe it is of more advantage to the king that it ſhould be carried on by a company (eſpecially in *London*), who may manage it with order and government, that is, by ſome power to reſtrain particular perſons from that liberty which otherwiſe they would uſe; and therefore ſuch companies have always power to make bye-laws to regulate trade, which is the chief end of their incorporation (b). And if ſuch corporations have power to judge and determine who are fit perſons to exerciſe trades within their juriſdiction, the king hath certainly a greater prerogative to determine which of his ſubjects are fit to trade to particular places excluſive from the reſt (c). That the governors of corporations have taken upon them ſuch authority, appears in *Townſhend's Caſe*, who ſerved an apprenticeſhip to a taylor in *Oxford*, and was refuſed by the mayor to be made a free man of that city; which ſhews that if a perſon be not qualified, he may be excluded (d). This is a very ancient company, for cloth was firſt brought into this realm in the reign of *Edward the third*, and was always under ſome government. My *Lord Rolls* (e), quoting the parliament roll of *Henry the fifth*, wherein the commons pray that all merchants may import or export their goods to any place (except ſuch as were of the ſtaple), paying the cuſtoms, takes notice that this prayer was made againſt the companies which prohibited ſuch trading. This ſhews that even in thoſe days trade was under a regulation. King *Edward the third* gave licence to all merchants denizens, who were not artificers, to go into *Gaſcoigne* for wines, and that aliens might bring wines into this realm, and that all merchandizes might be carried into *Ireland*, and exported from thence (f); which ſhews, that without ſuch leave perſons could not trade thither, and denizens could not import wines from thoſe parts. * The caſe of ſole printing is a manufacture, and ſo not in the power of the king to reſtrain, for it is a piece of art and ſkill; but when once it becomes of public concernment, then the prerogative interpoſes. It is a vain objection to ſay, that every ſubject has a right to trade, which right is grounded upon the common law; for that law can give no ſuch authority againſt any king's prohibition. For ſuppoſe a foreign prince ſhould forbid the ſubjects of *England* to trade within his dominions, what right can the common law give them ſo to do? or, ſuppoſe any foreign prince ſhould reſtrain trade to a particular number of men excluſive from the reſt, how would the common law help them? ſo that if this trade depend upon the will of a foreign prince, why may not the king of *England* prohibit his ſubjects from uſing of it? He who has the ſole power of making leagues and treaties is the foundation of trade; and can

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10. Mod. 25. 105. 130. 338. 11. Mod. 48. 2. Stra. 739. 2. Ld. Ray. 1129. 1456. 1. Peer. Wms. 181. to 197.

*[129]

(a) The caſe of Broad *v.* Jolliffe, Cro. Jac. 396.

(b) Smith's Wealth of Nations, vol. iii. page 109. 111. 144.

(c)

(d) 1. Sid. 107.; but ſee now 12. Geo. 3. c. 21.

(e) 2. Roll. Abr. 174. pl. 39. in abridging the caſe in the Year Book 1. *Hen.* 5. No. 21.

(f) See the ſtatutes 34. *Edw.* 3. c. 18. and 38. *Edw.* 3. c. 11.

that

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that right which the subject has at the common law be independent on this? The question now is about the regulation of a trade by letters patents, which the king has power to do.—FIRST, *By his prerogative*; for the appointment of the staple is not by virtue of any act of parliament (*a*), but it is the effect of leagues and treaties.—SECONDLY, *By acts of parliament*, which have allowed such grants (*b*), and from other acts which take notice of the king's prerogative. In the Year Book 12. *Hen.* 7. *pl.* 6. a fellowship of merchant adventurers in *London* made an order to restrain all persons to sell at such a mart without their consent. The statute of 3. *Jac.* 1. c. 6. recites letters patents of the incorporation to certain merchants to trade into *Spain*; and 4. *Jac.* 1. c. 9. recites the like letters patents granted to the merchants of *Exeter* by the queen.

The next thing to be considered is, what acts of parliament have either taken away or abridged the king's prerogative.

1. Peer. Wms. 117. 320 3. Peer. Wms. 434.

The first is MAGNA CHARTA, *viz.* that all merchants shall stay here, *nisi publicè antea prohibiti*, the meaning of which has been already explained. The second statute is that which the defendant has pleaded. In answer to which it is to be observed, that a preamble of any statute law is the best expositor of it, because it

* [130] usually mentions the occasion of its being made; and this act amongst other * things and petitions recites, that the king had granted to the men of *Flanders*, that the staple of wool should be at *Bruges*, which town had ordered that no wool should be sold to strangers, which was much to the damage of trading merchants. Now what is the remedy in this case? Why the king grants that they may buy wool at such prices as they can agree, and carry it where they please, let the seas be open, &c. so that this act had only a prospect to remedy the abuse of the staple, which has in no sort abridged the king's prerogative. If there should be no regulation of trade by the power and prerogative of the king, what would become of the *Turkey Company*, when it might be in the power of one man to ruin all the effects of our *English* merchants there by a misdemeanor? therefore it ought to be looked after very strictly. All arguments which may be deduced from monopolies will have no influence upon this case, because this grant does not bar the subject of any precedent right.

As to THE SECOND POINT, it is not to be doubted but that since they are abridged in interest an action on the case will lie.

MR. POLLEXFEN, *contra*. These letters patents extend to a great part of *Europe*, and the consequence of this judgment (if for the plaintiffs) must be, that all merchants trading thither must be of this company, or excluded from trade in those parts. Now supposing that several men may be of this company, it is impossible that all merchants, who trade into those parts of *Europe*, should be members thereof; for where should they meet to make bye-laws? neither is it probable that other merchants who live remote from

(*a*) See the 27. *Edw.* 3. c. 1. 43. *Edw.* 3. c. 1.

(*b*) See Year Books 47. *Edw.* 3. pl. . ; and 1. *Hen.* 5. pl. 40.

London

London will adventure their stock and estates with the citizens. What will become of the clothiers? must they sell their cloth at the rate imposed by this company? The question is not, Whether the king may restrain his subjects from trading to particular places? or that the trade of the people is not under the government of the king? nor, whether he may make leagues and treaties? for it is certainly his prerogative; nor, how the staple was formerly? which has been long since discontinued, and not easy to find out; nothing will follow from either of these considerations which may be of any use in this case. * But the question is, Whether the king can make such a grant excluding all others from trading? for it is expresly provided by the statute of 12. *Hen.* 7. c. 6. that no *Englishman* shall take of another any fine or imposition for his liberty to buy and sell. The case of the *East India Company* is not like this; for they who argued then did admit, that if the grant to that company had restrained the subjects from trading to christian countries, it had been void; but it only prohibiting a trade with *infidels*, with whom we should have no communication without the king's licence, lest we should forsake the catholic faith and turn *infidels*, for that reason it was held good. And such a licence was seen by my *Lord Coke*, as he tells us in *Michelburn's Case (a)*, which was granted in the reign of *Edward the third.* But a patent to exclude all others is void both by the common law and the statute law. As to the argument, that the common law gives no privilege to trade against the king's prohibition, because foreign princes may restrain the trade to a particular number of men; can any inference be made from thence that the kings of *England* may therefore restrain trade to a like number of men? All patents prohibiting trade are void *(b)*. If a man would give lands in mortmain, or would have a new way by taking in the common highway, this may be done with the king's licence, and the escheator or sheriff is to examine the fact; and if it be *ad damnum alterius*, such a licence is void as being prejudicial to the subject; and if it is void, *à fortiori* a grant to restrain trade must be so *(c)*. All engrossing and monopolizing are void by the common law; the one is a species of the other; it is defined by my *Lord Coke (d)* to be an allowance by the king's 'grant to any person for the sole buying or selling of any thing, restraining all others of that liberty which they had before the making of such a grant; and this he tells us is against the ancient and fundamental rights of this kingdom. This patent agrees exactly with that definition, and therefore it must be against law; it is against an act of parliament which gives liberty to merchants to buy and to sell in this realm without disturbance *(e)*; and it is expresly against the statute of 21. *Jac.* 1. c. 3. which declares all such letters patents to be void. * That which may give some colour to

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* [131]

2. Chan. Cas. 165. 1. Vern. 120. 130. 307. 10. Mod. 10[illegible] 133.

* [132]

(a) 2. Brownl. 296.
(b) 13. *Hen.* 4. pl. 14. 1. Roll. Rep. 4.
(c) Fitz. N. B. 222.
(d) 3. Inst. 181.
(e) See the 9 *Edw.* 3. c. 1.; the 18. *Edw.* 3. c. 3.; the 25. *Edw.* 3. c. 2.; the 2. *Rich.* 2. c. 1.; the 11. *Rich.* 2. c. 7.; and 1. Roll. Abr. 180.

make

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make fuch grants good, is a pretence of order and government in trade; but my *Lord Coke (a)* was of opinion, that it was a hinderance to both, and in the end it produced monopolies. There is a great difference between the king's grant and his prohibition; for the one vefts an intereft, which is not done by the other; and all prohibitions determine by the king's death, but grants ftill remain in force.

Adjournatur.

(*a*) 2. Inft. 540.

Cafe 88. Langford *againft* Webber.

To trefpafs for taking a horfe, a juftification that the defendant was *poffeffed* of a clofe, and took the horfe *damage feafant*, is good.

S. C. Carth. 9. S. C. 3. Salk. 356. Ante, 49. 2. Mod. 70. 10. Mod. 25. 37. 141. 11. Mod. 219. 12. Mod. 507. 188. 2. Stra. 1238. 5. Com. Dig. "Pleader" (C. 41.). (E. 19.). 3. Wilf. 21. 1. Ld. Ray. 276. 332. 2. Ld. Ray. 923. 1230. 1. Term Rep. 428.

TRESPASS for the taking of a horfe.—The defendant juftified, For that *Jofeph Afh* was *poffeffed* of a clofe, &c. and that the defendant as his fervant took the horfe in that clofe *damage fefant*.

The plaintiff demurred to this plea, For that the defendant did not fhew what title *Afh* had to this clofe.

THE COUNSEL *for the defendant* infifted, that it being in trefpafs, it is fufficient to fay that *Afh* was *poffeffed*, becaufe in this cafe poffeffion is a good title againft all others. But it might have been otherwife in replevin. The title of the clofe is not in queftion; the *poffeffion* is only an inducement to the plea, and not the fubftance thereof, which is the taking of the horfe; and the law is plain, that where the intereft of the land is not in queftion *(a)*, a man may juftify upon his own *poffeffion* againft a wrong-doer *(b)*.

MR. POLLEXFEN, *on the other fide*, alledged, that *damage fefant* would bring the title of the land in queftion:

But THE COURT gave judgment for the defendant.

(*a*) See 2. Mod. 70. Carth. 444. 74. and the cafe of Johns *v.* Whitley, 3. Wilf. 65.

(*b*) Ante, 49. Cro. Car. 138. Cro. Car. 190. Co. Lit. 303. Yelv. Lutw. 1492. Salk. 643.

Cafe 89. Perkins *againft* Titus.

A cuftom of a manor, that every tenant who fhould be admitted to any copyhold eftate fhould pay a year's value for a fine, according to the value of the land at the time of admiffion, is good; for though it is uncertain what the value may be, yet it may be reduced to a certainty by a jury.—S. C. 3. Lev. 255. S. C. Comb. 43. S. C. Carth. 12. S. C. Skin. 247. S. C. 2. Show. 507. S. C. Lilly's Ent. 371. Poft. 240. Co. Lit. 59. Kit. 103. 2. Bulft. 32. Cro. Eliz. 779. Noy, 2. Moor, 623. 4. Co. 27. Hob. 135. Chan. Rep. 467. Prec. Chan. 568. 2. Com. Dig. 506. 1. Stra. 654. Stra. 1042. 1070. 3. Burr. 1717. Ld. Ray. 45. 70. 409. 499. 2. Ld. Ray. 1158. Prec. Ch. 568. 1. Bac. Abr. 480. 3. Peer. Wms. 150. Dougl. 730. *notis*.

A WRIT OF ERROR was brought to reverfe a judgment given in the common pleas, in replevin, for taking of the plaintiff's fheep.—The defendant avowed the taking *damage fefant*.—The

plaintiff

plaintiff replied, that the lands WHERE, &c. were copyhold, held of the manor of *Bushy* in the county of *Hertford*, the custom whereof was, that every tenant of the said manor *qui admissus foret* to any copyhold estate should pay a year's value of the land for a fine, as the said land is worth *tempore admissionis*.—* The defendant demurred.

* [133]

The question was,—FIRST, Whether this be a good plea or not, as it is pleaded?

SECONDLY, If it be good as pleaded, then whether such a custom may be supported by law?

For the plaintiff in the writ of error it was now, and in *Michaelmas Term* following, argued, that it was not a good custom. The substance of the arguments were, that fines are either certain or uncertain; those which are uncertain are arbitrary, and therefore cannot be due of common right, nor by custom; for there can be no custom for an uncertain fine, and such is this fine; for the value of the land cannot be known, because, as this custom is pleaded, it does not appear whether it shall be a year's value past or to come, at the time of the admittance of the tenant. A custom to assess *rationabilem denariorum summam* for a fine upon an admittance, that is to say, being two years rent of a tenant of the yearly value of fifty-three shillings and fourpence, is no good custom *(a)*. A lease is made for so many years as a third person shall name; this is altogether uncertain; but when the term is named then it is a good lease, but this can be done but once *(b)*. How can this fine be assessed? It cannot be by jury, for then it stands in need of the common law, and will be therefore void; for a custom must have nothing to support it but usage.—Neither can this be a good custom as it is pleaded, because all customs are made up of repeated acts and usages, and therefore, in pleading them, it must be laid *time out of mind*, which is not done here; for *admissus foret* has a respect to future admissions, and are not to those which are past. AGAIN, here is no time laid when this fine shall be paid; for it is said, *quilibet tenens qui admissus foret, &c. solvet tantam denariorum summam quantum terra valebat per annum tempore admissionis, &c.* which last words must be taken to relate to the value of the land, and not to the time when the fine shall be paid; so that if there be such a custom, which is *lex loci*, and not fully set forth and expressed, the common law will not help it by any construction.

SECOND POINT. Whether such a custom can be good by law? And they argued that it cannot. Where the fine is certain, the lord may refuse to admit without a tender of it, upon the prayer of the person to be admitted; but where it is uncertain, the lord

1. Stra. 654. 2. Stra. 1042. 1070.

(*a*) 13. Co. 1. But see the case of Grant *v.* Astle, that *two years rent*, without any deduction for the land-tax, is fixed as the sum assessable for an *arbitrary fine* on admission to a copyhold estate. Dougl. 724.

(*b*) Fitz. Abr. 273.

is first to *admit* the tenant, and then to set *the fine* (*a*), the reasonableness whereof is to be * determined by judges before whom the case shall depend, or upon demurrer, or by a jury upon proofs of the yearly value of the land (*b*); but for non-payment of an unreasonable fine the lord cannot enter (*c*). The law admits of no custom to be good but such as is very certain; for uncertainty in a custom as well as in a grant makes both void; and therefore it is held a void custom for an infant to make a feoffment when he can measure an ell of cloth (*d*). It may be objected, that *certum est quod certum reddi potest*; the meaning of which saying must be, *quod certum reddi potest* by something which is certain; for if this rule should be taken to be an answer to uncertainties, it would destroy all the Books, which say a custom must be certain (*e*). The law is very clear, that a custom is void for the uncertainty; therefore this custom must be void, for the value of land is the most uncertain thing in nature, and therefore perjury will not lie for swearing to the value (*f*).

Post. 290. 8. Mod. 207. 11. Mod. 68. 161. 2. Vern. 684. Fitzg. 55. 2. Stra. 1145. 1224. Ld. Ray. 869. 1135. 1432. 1558.

FULLER, *Serjeant*, and MR. FINCH, *contra*. The chief objection is the uncertainty of this custom: now if a custom as uncertain as this has been held good in this court, it is a good authority to support this custom. And as to that it was said, that a custom for a person (whom a copy-holder should name) to have his land after his death, and that he should pay a fine for his admittance; "and if the lord and tenant cannot agree about the fine, "that then the rest of the tenants should assess it;" this was adjudged a good custom by the court of common pleas, and affirmed upon a writ of error in this court; it was the case of *Crab v. Bevis*, cited in the case of *Warne v. Sawyer*.

1. Roll. Rep. 48. 2. Cro. 368. 4. Leon. 238. Noy, 3. 2. Brownl. 85.

Adjournatur.

Afterwards the first judgment was affirmed, and ALL THE COURT held the custom to be a good custom.

(*a*) 4. Co. 27. b.—Therefore if the lord of a manor refuse to *admit* a person to whom a copyhold is surrendered, on account of a disagreement respecting *the fine* to be paid, THE COURT will grant a *mandamus* to compel the lord to admit, without examining the right to the fine; for no right to *the fine* can arise till admittance. Rex *v.* Steward of Hendon, 2. Term Rep. 484.

(*b*) 2. Stra. 1145. 1224.

(*c*) See the case of Dow *v.* Golding, Cro. Car. 196.; Dalton *v.* Hammond, Cro. Eliz. 779.; and the statute 9. *Geo.* 1. c. 29. 3. Term Rep. 162.

(*d*) 1. Roll. Abr. 565. 6. Co. 60. Davies' Rep. 37.

(*e*) 1. Bl. Com. 78.

(*f*) Fitz. Abr. "Bar," 177. 2. Roll. Abr. 264. 12. Mod. 141. 512. 10. Mod. 195. Ld. Ray. 889. 1118.

Case 90.

Hacket *against* Herne.

Michaelmas Term, 36. *Car.* 2. *Roll.* 214.

If judgment be recovered against father and son, the father cannot bring a writ of error alone, although the son was under age.—S. C. Carth. 7. Ante, 109. Ld. Ray. 71. 1403. 2. Bac. Abr. 199. 8. Mod. 305. 12. Mod. 130. 240. 1. Roll. Abr. 747. Stra. 233. 606. B. R. H. 135. 1. Wils. 88. 1. Ld. Ray. 71. 2. Ld. Ray. 1403. Cowp. 425.

JUDGMENT was had in debt upon a bond against father and son, and afterwards the father alone brought a writ of error; and the error assigned was, that his son was under age: but because

cause the son did not join in the errors, THE COURT ordered the writ to be abated *(a)*.

HACKET *against* HERNE.

If a *quare impedit* be brought against a bishop and others, and judgment be against them all, they must likewise all join * in a writ of error, unless it be where the bishop claims only as ordinary.

All the defendants in *quare impedit* must join in error, unless the bishop claim only as ordinary.

It is true, this is against the opinion of LORD ROLLS in his Abridgment *(b)*, who puts the case, that where a *scire facias* was brought against four executors, who pleaded *plenè administraverunt*, the jury find assets in the hands of two of them, and that the other *eant inde sine die*; two bring a writ of error, and although at the opening of the case it was held that the writ should abate for that reason, because brought only by two, yet he says the judgment was afterwards affirmed, and the writ held good.

But there is a difference where a writ of error is brought by the plaintiffs in the original action, and when by the defendants; for if two plaintiffs are barred by an erroneous judgment, and afterwards bring a writ of error, the release of one shall bar the other *(c)*, because they are both actors in a personal thing to charge another, and it shall be presumed a folly in him to join with another who might release all.

If several plaintiffs bring error, a release by one is a bar to the others.
Ante, 109.—
2. Roll. Abr. 412.
Cro. Jac. 117.

But where the defendants bring a writ of error it is otherwise; for it being brought to discharge themselves of a judgment, the release of one cannot bar the other, because they have not a joint interest but a joint burthen, and by law are compelled to join in errors.

A release by one of several defendants in error cannot be pleaded against the others.

Ante, 109. 6. Co. 25. Cro. Jac. 117. 4. Bac. Ab. 283.

(a) See the case of Ginger *v.* Cooper, 2. Ld. Ray. 1403. Stra. 606. 8. Mod. 316.

(b) Roll. Abr. 929. pl. 30.

(c) Ruddock's Case, 5. Co. 25. a. Ld. Ray. 244.

Mosse *against* Archer.

Case 91.

COVENANT by an assignee of an assignee of lands which were exchanged. The breach assigned was, that a stranger *habens jus et titulum* did enter, &c. There was a verdict for the plaintiff.

In covenant, a breach that a stranger *having right and title* entered, is not good, without shewing what right and title he claimed.

It was now moved in arrest of judgment, that the plaintiff had not shewed a sufficient breach, for he sets forth the entry of a stranger *habens jus et titulum*, but doth not shew what title, and it may be he had a title under the plaintiff himself, after the exchange made; and to prove this, the case of *Kirby v. Hansake (a)* was cited in point.

Hob. 35.
Cro. Jac. 315.

1. Mod. 294. 1. Sid. 466. 1. Lev. 301. 2. Lev. 37. 2. Saund. 180. 3. Lev. 325. 1. Mod. 66. 101. 292. 8. Mod. 318. 10. Mod. 384. 11. Mod. 78. 133. 12. Mod. 406. 413. Gilb. E. R. 252. 2. Show. 425. Comyns, 146. 180. 230. 1. Stra. 400. 681. 1. Ld. Ray. 106. 124. 2. Ld. Ray. 1419. Dougl. 43. 1. Term Rep. 671. 3. Term Rep. 584. H. Bl. Rep. 275. 5. Com. Dig. "Pleader" (C. 49.).

(a) Cro. Jac. 315.

And

Mosse against Archer. Exchange.

And of that opinion was ALL THE COURT (*a*).

NOTA, It was said in this case, that *an exchange* ought to be executed by either party in their life-time, or else it is void.

(*a*) But see Foster *v.* Pierson, 4. Term Rep. 617. that in assigning a breach of covenant for quiet enjoyment it is sufficient to alledge, that at the time of the demise to the plaintiff *A. B.* had lawful right and title to the premises, without shewing what title *A. B.* had.

*[136]

Case 92.

* Taylor *against* Brindley.

Variance between the *original* and *declaration*, where it is no error.

TRESPASS. The original was " *quare clausum fregit*," and the plaintiff declared *quare clausum et domum fregit*, and had judgment in the common pleas, and a writ of error was brought in this court.

Cro. Eliz. 185. 330. Lut. 1180.

The variance between the *original* and *declaration* was assigned for error, and that one was not warranted by the other (*a*).

4. Mod. 246. 5. Com. Dig. 25. 1. Ld. Ray. 4. 2. Ld. Ray. 1209. 1220. 1. Term Rep. 240.

In error, if the *original* certified be of another term, the Court will intend a verdict without an original.

But LEVINZ, *Serjeant*, argued, that because the original was certified three Terms since, and no continuances between it and the declaration, therefore that could not be *the original* to this action, and that the Court might for that reason intend a verdict without *an original*, which is helped by the statute of Jeofails (*b*). But he argued, that where the original varies from the declaration, and is not warranted by it, it is not aided by this statute.

1. Ro. Ab. 790. Cro. Jac. 674. Cro. Car. 272. 327.

JUDGMENT was affirmed.

(*a*) But now by 5. *Geo.* 1. c. 13. " *After verdict* no judgment shall be " stayed or reversed for any defect or " fault, either in *form* or *substance*, in " any bill, writ original or judicial, or " for any variance in such writs from " the declaration or other proceed- " ings."

(*b*) By 18. *Eliz.* c. 14. no judgment, after verdict, shall be stayed for any default or form in the writ, or for want of any original writ.

MICHAELMAS TERM,

The Third of James the Second,

IN

The King's Bench.

Sir Robert Wright, *Knt. Chief Justice.*

Sir Richard Holloway, *Knt.*
Sir Thomas Powel, *Knt.* } *Justices.*
Sir Richard Allibon, *Knt.*

Sir Robert Sawyer, *Knt. Attorney General.*
Sir Thomas Powis, *Knt. Solicitor General.*

Case 93.

* Mathews *against* Cary.

Easter Term, 3. *Jac.* 1. *Roll* 320.

TRESPASS for entering his house and taking a silver tankard.

Where the defendant justifies by way of *excuse*, he must set forth the warrant, and that he took the goods *virtute warranti.*

S.C. 1. Show. 61. S.C. Carth. 73. S.C. 3. Salk. 52. S.C. Holt, 408. S.C. Comb. 76. S.C. 1. Salk. 107. Moor, 574. Cro. Eliz. 698. 748. 4. Mod. 378. 12. Mod. 396. 509. 11. Mod. 112. 203. Skin. 587. 1. Brownl. 198. Salk. 108. 2. Hawk. P. C. 96.

The defendant made *conusance* as bailiff of the dean and chapter of *Westminster*, for that the place WHERE, &c. was within the jurisdiction of the leet of the said dean, who was seised of a court leet, which was held there such a day, &c.; and that the jury presented the plaintiff (being a tallow-chandler) for melting of stinking tallow, to the annoyance of the neighbours, for which he was amerced; and that the amerciament was affered to five pounds; which not being paid, the defendant, by *a mandate* of the said dean and chapter, distrained the tankard, &c.

The plaintiff replied, *de injuriâ suâ propriâ*, ABSQUE HOC that he did melt tallow to the annoyance of the neighbours, &c.

The defendant demurred to this replication.

It was argued this Term by MR. POLLEXFEN *for the defendant*, and TREMAINE *for the plaintiff:* and afterwards in *Michaelmas Term*, 1. *William & Mary*, by MR. BONITHORN and SERJEANT THOMPSON *for the defendant.*

MATHEWS against CARY.

It was said *for the defendant*, that a presentment in a court leet which concerns *the person* (as in this case) and not *the* * *freehold*, was not traversable, and that the amerciament was a duty vested in the lord, for which he may distrain, or bring an action of debt *(a)*.

But *on the other side* it was said, that if such a presentment is not traversable, the party has no remedy; it is contrary to the opinion of FITZHERBERT in *Dyer (b)*, who affirmed the law to be, that it was traversable, and that if, upon such a presentment, a fine should be imposed erroneously, it may be avoided by plea; and this agrees with the second resolution in *Godfrey's Case (c)*.

1. Ld. Ray. 71. 470. 2. Ld. Ray. 1140. 1173. 12. Mod. 235. 318. 602. 11. Mod. 71. 8. Mod. 297. Gilb. E. R. 209. Fitzg. 46. 109. Stra. 847.

SECONDLY, It was objected to the plea, that it was not good, for it sets forth, that the plaintiff was *amerced*, and that it was *affered* at the court, and so he has confounded the office of the jurors and affeerors together, which he ought not to do; for he should be amerced to a certain sum, and not in general; which sum may be mitigated or affered by others *(d)*. If it had been *a fine*, it need not be affered, because that is imposed by the Court; but this is an *amerciament*, which is the act of the jury, and therefore it must be affered *(e)*.

8. Mod. 218. 10. Mod. 25. 37. 1. Stra. 509. 711. 2. Stra. 1184. 1. Ld. Ray. 309. 2. Ld. Ray. 1100. 1530.

THIRDLY, The chief exception was to the matter of the warrant, *viz.* the defendant sets forth that he seized by virtue of *a precept* from the dean and chapter; whereas he ought to shew it was directed to him from the steward of the court, and then to set forth *the warrant*, without which he cannot justify to distrain for an amerciament *(f)*.

THE WHOLE COURT were of this opinion, and therefore judgment was given for the plaintiff, in *Michaelmas Term*, the first year of *William & Mary*. If it had been in *replevin* where the defendant made cognizance in the right of the lord, it might be well enough as here pleaded (*g*); but where it is to justify by way of excuse,

(*a*) See the Year Book 5. *Hen.* 7. pl. 3. Fitz. Abr. title "Bar," 271. Brook's Abr. title "Traverse sans Ceo," pl. 183. Brook's Abr. title "Presentment in Court," pl. 15. Co. Ent. 572. 2. Hawk. P. C. 111. 1. Bac. Abr. 644. 4. Bac. Abr. 449.

(*b*) Dyer, 13. pl. 64.—But see Rex *v.* Roupell, Cowper, 458. that a presentment is not traversable in the court leet; but in order to afford the defendant an opportunity of being heard, it may be removed by *certiorari* into the king's bench, and there traversed. But the Court will not grant a *certiorari* for this purpose, where the amerciament has been estreated, and the fine paid. Rex *v.* Heaton, 2. Term Rep. 184.

(*c*) 11. Co. 42. 1. Roll. Rep. 79.

(*d*) Wilton *v.* Hardingham, Hob. 129. 1. Roll. Abr. 542.; and Evelyn *v.* Davis, 3. Lev. 206. But in the case of Brook *v.* Hustler 1. Salk. 56. where these two cases are cited and relied on, it is determined, that the amerciament ought to be general, "*quod sit in misericordiâ*," and that is to be ascertained by affeerors.—See also 2. Hawk. P. C. 94. *accordant*. Stra. 847.

(*e*) 8. Co. 38. 1. Leon. 142. 2. Hawk. P. C. 94.

(*f*) Cro. Eliz. 698. 748. Moor, 574. 607. 1. Salk. 108. 2. Hawk. P. C. 96. 1. Bac. Abr. 236. 2. Bac. Abr. 117, 118. 3. Term Rep. 183.

(*g*) Stephens *v.* Haughton, Stra. 847. Fitzg. 46. pl. 9. Bar. K. B. 128. 214.

there

there you muſt aver the fact and alledge it to be done, and ſet forth the warrant itſelf, and the taking *virtute warranti*; for a bailiff of a liberty cannot diſtrain for an amerciament by virtue of his office, but he muſt have a warrant from the ſteward or lord of the leet for ſo doing (*a*). THE OTHER EXCEPTION, that the amerciament ought to be to a ſum; the precedents are otherwiſe; for an amerciament *per duodecim probos et legales homines adtunc et ibidem jurat. ad* 40*s. afferat.* is well enough (*b*), but the *warrant* is always ſet forth.

MATHEWS *againſt* CARY.

(*a*) Steverton *v.* Scroggs, Cro. Eliz. 698.; Rowleſton *v.* Alman, Cro. Eliz. 748. 1. Leon. 242. Moor, 574. 2. Hawk. P. C. ch. 10. ſ. 30.

(*b*) Raſtal's Entries, 606. Co. Ent. 665.

*[139]

The King *againſt* Darby.

Caſe 94.

THE DEFENDANT was indicted for ſpeaking of ſcandalous words of *Sir John Kerle*, a juſtice of the peace, VIZ. "*Sir John Kerle* is a buffle-headed fellow, and doth not underſtand "law; he is not fit to talk law with me; I have baffled him, and "he hath not done my client juſtice."

An *indictment* will lie for ſaying of a juſtice of the peace, that "he is a "buffle headed "fellow, doth "not underſtand "the law, and "hath not done "juſtice."

MR. POLLEXFEN, *for the defendant*, ſaid, that an indictment would not lie for theſe words, becauſe not ſpoken to the party in the execution of his office, but behind his back; it will not lie for irreverent words, but for libels and writings, becauſe ſuch are public, but words are private offences.

S. C. Comb. 65. S. C. Carth. 14. 1. Sid. 65. Cro. Jac. 58. Salk. 698. 3. Com. Dig. 499. 4. Com. Dig. 185.

But THE COURT was of opinion that an *indictment* would lie where an *action* would not, becauſe it reſpects the public peace; and that an action would not lie in this caſe, unleſs the party had a particular loſs; and therefore it has been held not to be actionable to call a juſtice of peace fool, aſs, coxcomb.

2. Mod. 326. 1. Hawk. P. C. 354. 8. Mod. 271. 10. Mod. 186. 11. Mod. 166. 195. 12. Mod. 98. 414. 514. 1. Ld. Ray. 153. 777. 2. Ld. Ray. 857. 1029. 1369. 1. Stra. 420. 617. 2. Stra. 1157. 1168.

MR. POLLEXFEN then took exceptions to *the form* of the indictment.

An indictment deſcribing the defendant "of "*Almondbury* "in the Weſt "Riding of "*Yorkſhire*," is a ſufficient *addition* of his abode within 1. *Hen.* 5. c. 5.

FIRST, There is no place of abode laid where the defendant inhabited, which is expreſsly required by the ſtatute of 1. *Hen.* 5. c. 5. *viz.* "That in indictments there ſhall be addition of the "eſtate, degree, &c. and of the towns, hamlets, places, and "counties where the defendants dwell;" and by the ſtatute of 8. *Hen.* 6. c. 12. which gives the Judges power to amend records in affirmations of judgments, ſuch defects which are named in the ſtatute of 1. *Hen.* 5. c. 5. are excepted; and therefore where a writ of error was brought to reverſe an outlawry upon the ſtatute of 5. *Eliz.* c. 9. for perjury; where the defendant was indicted by

12. Mod. 198. 1. Ld. Ray. 118. 2. Inſt. 669.

2. Hawk. P. C. 274. 314. 5. Com. Dig. 30. 3. Bac. Abr. 620. 3. Peer. Wms. 496.

 the

THE KING *against* DARBY.

the name of "NICHOLAS LEECH *de parochiâ de* ALDGATE," and it did not ſhew in what county *Aldgate* was; it was for this cauſe reverſed (*a*).

The caption of an indictment *coram juſtitiariis ad pacem dicti domini regis*, is ſufficient, without ſaying *nunc*.

SECONDLY, The caption is *coram juſtitiariis ad pacem dicti domini regis conſervand.* and the word "*nunc*" is left out. It was the opinion of TWISDEN, *Juſtice*, (*b*), that it ought to be *nunc conſervand.* for otherwiſe it may be the peace of *King Stephen*.

The Counſel *on the other ſide* ſaid, that it was a new doctrine,
* [140] that the king ſhall not have the ſame remedy by an indictment which the ſubject may have by an action; what is the meaning of the words of all commiſſions, *de propalationibus verborum?*

11. Mod. 165. 1. Ld. Ray. 215. 548. 638. 2. Ld. Ray. 710. 879. 1. Stra. 442. 1. Term Rep. 316.

* As to THE FIRST EXCEPTION, they ſaid, that the indictment was certain enough, for the defendant is laid to be *de Almondbury*, in the weſt-riding of *Yorkſhire*.

TO THE SECOND EXCEPTION they ſaid, that *ad pacem conſervand.* without *nunc*, is well enough; for it cannot be intended upon this indictment that they were juſtices to preſerve the peace in any other king's reign, and what was quoted out of *Siderfin* is but the opinion of one ſingle Judge.

This is a ſcandal upon the government, and it is as much as to ſay, that the king hath appointed an ignorant man to be a juſtice of peace, for which an indictment will lie.

And of that opinion was THE WHOLE COURT, and gave judgment accordingly (*c*).

(*a*) Leach's Caſe, Cro. Jac. 167.
(*b*) 1. Sid. 422.
(*c*) According to the reports of this caſe, Salk. 697. and Comb. 46. 66. the Court held the words indictable, and gave judgment for the crown; but Gould, *Juſtice*, in citing the caſe, in Rex *v.* Langley, 2. Ld. Raym. 1030. ſays the words were held not indictable. In Rex *v.* Langley, the defendant was indicted for ſaying *to* the Mayor of Saliſbury, "You "are a rogue and a raſcal;" and the indictment was quaſhed on demurrer, 2 Ld Ray. 1031. S. C. 6. Mod. 125.; and in Rex *v* Wrightſon, 11. Mod. 166. Hale, 350. Salk. 698. the above caſe of Rex *v.* Darby is denied to be law; and it is ſaid to have been alſo denied, in the King *v* Pocock, Trinity Term 14. & 15. *Geo.* 2.; but this does not appear in the report of the caſe in 2. Strange, 1153. See Prowſe *v.* Wilcox. poſt. 163.; and Rex *v.* Penny, 1. Ld. Ray. 153.

Caſe 95. Ball *againſt* Cock.

The death of the conuſor after *caption*, and before the *king's ſilver* is paid, cannot be aſſigned for error to reverſe the fine.—S. C. Lilly's Ent. 280. S. C. Comb. 66 Ante, 69. Poſt. 152. 2. Inſt. 511. 5. Co. 39. Hob. 330. 2. Vent. 48. Cro. Jac. 12. Dyer, 89. 220. Prec. Ch. 150. 2. Vern. 3. 10. Mod. 44. Gilb. L. R. 108. 1. Barnes, 144. 2. Bac. Abr. 523. 1. Wilſ. 37. Ld. Ray. 850. 872. 1. Burr. 360.

WRIT OF COVENANT did bear *teſte* the firſt day of *Trinity Term*, returnable *tres Trinitatis*, and it was taken by *dedimus* on the thirtieth of *July*. A WRIT OF ERROR was brought to reverſe this *fine*; and the error aſſigned was, that the cognizor died after the *caption*, and before the enrolment at the king's ſilver office.

It

It was argued by the Counsel *for the plaintiff* in the writ of error, that a fine *sur cognizance de droit de ceo* is said to be levied when the writ of covenant is returned, and the concord and king's silver (which is an ancient revenue of the crown *pro licentiâ concordandi)* duly entered; for though the cognisor die afterwards, the fine is good, and the land passeth; but if the king's silver be not entered, the fine may be reversed by writ of error; for it is an action, and judgment, and the death of either party, abates it *(a)*. If it should be objected, that this cannot be assigned for error, because it is against the record, which is *placita terræ irrotulat. de Termino Sanctæ Trinitatis anno primo Jacobi, &c.*; it is true, an error cannot be assigned against the very essence of a record, but in the matter of time it may, and so it is in this case. It is like *Syer's Case*, 32. *Eliz.* who was indicted for a burglary supposed to be done the first of *August*, and upon the evidence it appeared to be done the first of *September*; and though he was acquitted of the indictment for that reason, *viz.* because the judgment * relates to the day of the indictment, yet it was resolved by all the Judges of *England*, that the very day need not be set down in the indictment; for be it before or after the offence, the jury ought to find according to the truth of the case upon the evidence, for they are sworn *ad veritatem dicendam, &c. (b)*. This must be assigned for error; for if the contrary be said, it is against the record, the *custos brevium* having returned that the fine was taken 30 *July*, which could not be in *Trinity Term*, for that ended 8 *July*, otherwise it is repugnant to itself. *[114]

BALL against COCK.

E contra. It was argued, that this is not assignable for error: it is true, if the party had died before the entry of the king's silver, it had been error, but if afterwards it is not so *(c)*. Thus was the case of *Warnecomb v. Carril*, which was, Husband and wife levied a fine of the lands of the wife, and this was by *dedimus* in the *Lent* Vacation, she being then but nineteen years of age; the king's silver was entered in *Hilary Term* before, and she died in the *Easter-week*; and upon a motion made the first day of *Easter Term* to stay the ingrossing of the fine, it was denied by the Court, for they held it to be a good fine. Another reason why this is not assignable for error is, because it is directly against the record, which is of *Trinity Term*, and can be of no other Term; and to prove this he cited *Arundel's Case (d)*, where a writ of error was brought to reverse a fine taken before ROGER MANWOOD, *Esquire*, in his circuit, he being then one of the Justices of the common pleas, and the *dedimus* was returned *per* ROGERUM

10. Mod. 170. 283. 368. Ld. Ray. 884.

(*a*) Ante, 99. Dyer, 220. 5. Co. 37. Cro. Eliz. 469 —See also 2. Jones, 181. Ray. 462. Skin. 343. 2. Lev. 127.; and the case of Watts *v.* Birkett, 2. Wils. 115.

(*b*) See the Year Book 10. *Hen.* 7. pl. 24. 3. Inst. 230. and Hind's Case, 4. Co. 70.

(*c*) Dyer, 220. 12. Co. 124.—See also 2. Inst. 511. 2. Leon. 127. 3. Com. Dig. "Fine" (E. 7.). Shepherd's Touch. 3. 2. Ld. Raym. 850.

(*d*) Cro. Jac. 11. Yelv. 33.—See also 1. Roll. Abr. 717. 2. Bac. Abr. 219. 538. 1. Wils. 43. 1. Term Rep. 240.

BALL *against* COCK.

MANWOOD, *Militem*, for he was knighted and made Chief Baron the Term following; the fine passed, and this was afterwards assigned for error, that he who took the caption was not *a knight*; but it being directly against the record, they would not intend him to be the same person to whom the writ was directed.

Adjournatur.—Afterwards the fine was affirmed.

Case 96.

Lock *against* Norborne.

Verdict shall only be given in evidence amongst privies.

* [142]

1. Ld. Ray. 730. Hard. 462. 472. Yelv. 22. Hob. 53. Carth. 181. 1. Vern. 413. Prec. Ch. 212. Gilb. E. R. 2. 10. Mod. 292. 12. Mod. 319. 339. Bull. N. P. 232. 2. Stra. 1151. 2. Ld. Ray. 1292. 1. Brown's Cas. in Parl. 11.

UPON A TRIAL AT BAR in ejectment for lands in *Wiltshire*, the case was thus:

Mary Philpot, in the year 1678, made a settlement by lease and release to herself for life; then to trustees to support contingent remainders; then to her first, second, and third son, in tail male, &c.; then to *Thomas Arundel* in tail male, with divers remainders over.

It was objected at the trial, that she had no power to make such settlement, because in the year 1676 her husband had * settled the lands in question upon her for life, and upon the issue of his body, &c. and for want of such issue, then upon *George Philpot* in tail male, with several remainders over, the remainder to *Mary Philpot* in fee, proviso that upon the tender of a guinea to *George Philpot* by the said *Mary*, the limitations as to him should be void.

George Philpot having afterwards made a lease of this land, to try the title, the trustees brought an ejectment; but because the tender of the guinea could not be proved, there was a verdict for the defendant.

And now *Mr. Philpot* would have given that verdict in evidence at this trial:

But was not suffered by THE COURT; for if one man has a title to several lands, and he bring ejectments against several defendants, and recover against one, he shall not give that verdict in evidence against the rest, because the party against whom that verdict was had may be relieved against it, if it is not good, but the rest cannot, though they claim under the same title, and all make the same defence. So if two tenants defend a title in ejectment, and a verdict be had against one of them, it shall not be read against the other, unless by rule of Court. But if an ancestor has a verdict, the heir may give it in evidence, because he is *privy* to it; for he who produces a verdict must be either party or privy to it, and it shall never be received against different persons, if it do not appear that they are united in interest: therefore a verdict against *A.* shall never be read against *B.*; for it may happen that one did not make a good defence, which the other may do.

3. Term Rep. 308.

See Bell *v.* Harwood, 3. Term Rep. 308.

The tender of the guinea was now proved.

HILARY

HILARY TERM,

The Third of James the Second,

IN

The King's Bench.

Sir Robert Wright, *Knt. Chief Justice.*
Sir Richard Holloway, *Knt.*
Sir Thomas Powel, *Knt.*
Sir Richard Allibon, *Knt.* } *Justices.*
Sir Thomas Powis, *Knt. Attorney General.*
Sir William Williams, *Knt. Solicitor General.*

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* Memorandum. Case 97.

THIS Vacation SIR ROBERT SAWYER had his *quictus*; and SIR THOMAS POWIS was made *Attorney General*; and SIR WILLIAM WILLIAMS, of *Gray's Inn*, was made *Solicitor General.*

SAWYER removed; POWIS and WILLIAMS promoted.

Rex *against* Lenthal. Case 98.

AN INQUISITION was taken in the second year of this king, under the great-seal of *England*, by which it was found, that the office of MARSHAL of the *King's Bench* did concern the administration of justice; that *Mr. Lenthal* was seised thereof in fee; that upon his marriage he had settled the said office upon *Sir Edward Norris* and *Mr. Coghill*, and their heirs, in trust that they should permit him to execute the same during his life, &c.; that the said trustees had neglected to give their attendance, or to execute the said office themselves; that this conveyance was made by *Mr. Lenthal* without the notice of this Court; that he received the profits, and afterwards granted the said office to

The MARSHAL of the king's bench prison, being seised of the said office in fee, grants the same to *A.* and *B* and their heirs, in trust to himself for life, with divers remainders over.*

S. C. Comb. 95. S. C. Skin. 113. Co. Lit. 235. 9. Co. 5. 97. Raym. 216. 2. Lev. 71. 2. Roll. Abr. 153. Cro. Car. 587. Jones, 563. 1. Chan. Cases, 70. 3. Bac. Abr. 302. 734. 6. Mod. 57. Hob. 153. 1. Ld. Ray. 159. 2. Ld. Ray. 1005. 2. Salk. 587.

REX *against* LENTHAL.

Cooling for life; * that *Cross* and his wife had obtained a judgment in this court against *Bromley*, and had sued forth execution for the debt and damages, for which he was committed to the custody of the said *Cooling*, and being so in execution did go at large; that *Cooling* had not sufficient to answer *Cross* and his wife for the said debt, &c.; that thereupon they impleaded *Mr. Lenthal* in the common pleas for 121l. 2s. 4d. to answer as *superior*; that at the trial *Mr. Lenthal* gave this secret deed of settlement in evidence, whereupon the plaintiffs in that action were non-suited, *ad damnum, &c.*; that *Cooling* went out of the said office, and, the trustees neglecting the execution thereof, *Mr. Lenthal* granted the same to *Glover* for life; that during the time he executed this office, one *Wordal* was convicted of forgery, and committed to his custody; and that he permitted him voluntarily to escape, by which the said office was forfeited to the king; and that the king had granted the office to the *Lord Hunsdon*.

Sir Edward Norris and *Mr. Coghill* come in and plead, that *Mr. Lenthal* was seised in fee; that he made a settlement of the office upon his marriage with *Mrs. Lucy Dunch* (with whom he had five thousand pounds portion), *viz.* upon them and their heirs in trust, *prout* in the inquisition; and that he did execute the office by their permission.

Mr. Lenthal pleads, and admits the grant to *Sir Edward Norris* and the other trustee, bearing date such a day, &c. but says, that the next day afterwards, *viz.* the 10th day of *August*, a trust of the said office was declared by another deed, *viz.* to himself for life, with remainders over, and that by virtue thereof, and the consent of the trustees, he took upon him the execution of the said office, and was thereof possessed, either by himself or his deputy, until the time of the inquisition taken; then he traversed that the escapes were voluntary (but did not answer the concealing of the grant); and concludes, *per quod petit* that the king's hands may be amoved, &c.

POWIS, *Attorney General*, demurred to the plea of the *trustees*; he likewise demurred to the plea of *Mr. Lenthal*; and took issue that the escapes were voluntary.

* [145] It was argued this Term and *Trinity* following by Counsel on both sides; and as to the matter of law, they made these points:

Prec. Ch. 199. Comyns, 1. 1. Ld. Ray. 259. 853. 2. Ld. Ray. 1038. 1245. 12. Mod. 10. 42. 77. 179. Cases T. T. 97. 140. 1. Pr. Wms. 161. 3. Pr. Wms. 391.

* FIRST, That this office cannot be granted in trust.

SECONDLY, The escapes found in the inquisition, and not answered by the trustees, are sufficient causes of forfeiture of this office.

THIRDLY, Another point was raised, Whether the assignment of this office to trustees (admitting it could be so granted) and their declaration of the trust, created an estate at will in *Mr. Lenthal*?

FIRST,

First, If it was a tenancy at will, then, Whether *Mr. Lenthal* had done any thing to determine his will?

Secondly, Whether he can by law make a deputy?

Thirdly, Whether the assigning of this trust, without giving notice thereof to this Court, be a forfeiture?

Quære, If, before the statute 27. *Geo*. 2. c. 17. the marshal of the king's bench could grant the custody thereof in trust?

First point. This office cannot be granted in trust, because it is a personal inheritance, and will not pass by such conveyances as are used to convey lands; so is my Lord of *Oxford's Case* (*a*), in which it was held, that a covenant to stand seised of an office is void: neither can *Mr. Lenthal* take upon him the execution of this office by the consent of the trustees, for that cannot be without deed. If the law should be otherwise, this inconvenience would follow, *viz*. *Mr. Lenthal* might grant the office to another without leave of the Court, and the grantee might suffer voluntary escapes, having no valuable interest to answer the parties injured, who must then sue *Mr Lenthal*; and he has no estate in him, for he has conveyed the inheritance to the trustees; and if they should be likewise sued, no recovery could be against them, because they are only nominal. It is almost like the grant of an office of chief prothonotary of the court of common pleas to two persons for life, which cannot be good, because the rolls of the court cannot be in the keeping of two persons at one time (*b*). It has been adjudged, that this very office cannot be granted for years (*c*), because it is an office of trust and daily attendance; and such a termor for years may die intestate, and then it would be in suspence until administration is committed, which is the act of another court.

*[146]

Quære, If a voluntary escape suffered by the marshal of the king's bench prison, and the non-attendance of trustees to whom the custody was granted, is a forfeiture of the office?

Second point, That the escapes found in the inquisition, and the non-attendance of the trustees, are sufficient cause of forfeiture. It is true, at the common law, debt upon an escape will not lie against the gaoler; that action was afterwards given by the statute of *Westminster the Second*; for before that act, the only remedy against * the gaoler was to bring an action on the case against him, founded upon a wrong done; but now debt will lie, and if the party be not sufficient at the time of the escape, *respondeat superior* (*d*). The marshal who executes this office, be it by right or wrong, is answerable to the king and his people for escapes: if they are voluntary, it is a forfeiture of his office: nay, if a deputy suffer such escapes, it is a forfeiture by the principal, unless such deputation be made for life, and then the grantee for life only

Cases T. T. 222. Stra. 901. 951. 1226.

(*a*) Jones, 118. 128. Hob. 170. Comb. 96.

(*b*) 18. *Edw*. 4. pl. 7. 2. Roll. Abr. 152. Hob. 153. 1. Show. 289. 4. Mod. 17. Bac. Abr. 734. 738. 11. Co. 3. 2. Mod. 95. 260. Cases Temp. Talbot, 97. 127. 143.

(*c*) Meade *v*. Lenthall, Cro. Car. 587. Jones, 437.—See also 1. Roll. Abr. 847. 2. Roll. Abr. 189. 678. 4. Com. Dig. 287. 3. Bac. Abr. 302.

(*d*) Dyer, 273. 2. Inst. 382.

forfeits

Rex *against* Lenthal.

10. Mod. 74. 108. 290. 12. Mod. 13. 90. 466. Fitzg. 186. 293. 1. Ld. Ray. 424. 2. Peer. Wms. (657).

forfeits the office *(a)*. As to the non-attendance of the trustees, if *Mr. Lenthal* be tenant at will, and has granted this office to another for life, this is a determination of the tenancy at will, and a forfeiture as to him (*b*). Now this grantee for life cannot be said to be a deputy, for such a grantee himself cannot make a deputy, and therefore *à fortiori* a tenant at will cannot do it (*c*). But admitting he should be deputy, yet a forfeiture by him is a forfeiture by his superior; and therefore, *Mr. Lenthal's* tenancy at will being gone, the trustees ought to attend, and their non-attendance ought to be a forfeiture (*d*). The non-attendance of an officer who was only a searcher in a port-town, was adjudged a forfeiture (*e*); much greater is the fault of that officer who has the administration of justice, if he do not give his attendance. Besides, if they do not attend, by consequence they cannot act in the office, and non-feazance is as sufficient a cause of forfeiture as any other misbehaviour whatsoever *(f)*. But if the trustees had given attendance, they are persons inexperient, and therefore incapable to execute this office, for which they may be lawfully refused by this Court.

Mr. Pollexfen chiefly insisted upon the point of pleading, that the matter found by the inquisition was not answered by the plea.

2. Stra. 1208. 1. Ld. Ray. 201. 211.

First, He excepted, that the defendant had not by his plea entitled himself to any estate in this office, and therefore he could not traverse the title of the king, without making a title to himself; for why should he desire that the king's hands may be amoved, and he restored to his office, if he has not shewn a title to it *(g)*? His pleading of this deed of trust, by which he is permitted to receive the profits, &c. during life, cannot create such an estate in [147] him as will be executed by the statute of Uses; therefore * he can have no estate for life; for if a man be seised in fee of an estate, and make a declaration thereof in trust for *J. S.* this is no colour

(*a*) By 8. & 9. *Will.* 3. c. 26. which takes away all distinctions between *voluntary* and *permissive* escapes as to plaintiff's remedy, a further penalty is added; for "If any marshal or warden, or their respective deputy or deputies, or any keeper of any other prison within this kingdom, shall take any sum of money, gratuity, or reward, whatsoever, or security for the same, to procure, assist, connive at, or permit, any such escape, and shall be thereof lawfully convicted, the said marshal or warden, or their respective deputy or deputies, or such other keeper of any prisons as aforesaid, shall, for every such offence, forfeit the sum of *five hundred pounds*, and his said office, and be for ever after incapable of executing any such office."—See also Carter, 212. 10. Mod. 74. Fitzg. 186. 293. Ld. Ray. 424. Salk. 272. 5. Mod. 414. 2. Bac. Abr. 240.

(*b*) Year Book 39. *Hen.* 6. pl. 32. 2. Roll. Abr. 155. 4. Mod. 29. 1. Salk. 435. 3. Bac. Abr. 732.

(*c*) Dyer, 278. Cro. Eliz. 534. 3. Lev. 288. 3. Bac. Abr. 741.

(*d*) 2. Roll. Abr. 155. 4. Com. Dig. 300. 3. Bac. Abr. 742.

(*e*) Cro. Car. 492.

(*f*) 39. *Hen.* 6. pl. 34. 9. Co. 46. Dyer, 150. 198. 1. Sid. 81.

(*g*) 1. Leon. 202. 2. Inst. 695. Staund. P. C. 64. 2. Leon. 123.

to make an eſtate for life in *J. S. (a)*. The defendant has therefore no more than a truſt in this office, which is nothing in the eye of the law, and for which there is no remedy but by *ſubpœna* in chancery; ſo that, being only a *ceſtui que truſt*, he hath neither *jus in re* nor *ad rem.* He cannot be tenant at will, for he is not made ſo by the deed of truſt. There is a great deal of difference between evidence and pleading; for this very deed may be an evidence of an eſtate at will, but it is not ſo in pleading; therefore he ought to have pleaded that *quorum prætextu* he was poſſeſſed of the office, and took the profits, &c.; but he having otherwiſe pleaded, and not entitled himſelf to any eſtate therein, he ought to be laid aſide as an incompetent perſon. The plea of *Sir Edward Norris* is likewiſe inſufficient; for it ſets forth the deed of ſettlement, &c. *quorum prætextu* (the defendant) *juxta fiduciam in eo poſitam*, was poſſeſſed of the office *ad eorum voluntatem.* Now an office is a thing which lies in grant, and cannot be transferred from one to another without deed, and here is no deed pleaded; and as no eſtate at will can be granted of an office without deed, ſo likewiſe there cannot be a deputation of ſuch office without it *(b)*. If then there can be no tenant at will of an office but by deed, and no ſuch deed is pleaded, then *Mr. Lenthal* had no power to make a deputation to *Cooling*; but neither tenant at will nor tenant for life can make a deputy, if in the very grant made to them there is not an expreſs clauſe for the execution of the office *per ſe vel ſufficientem deputatum ſuum.* The ſubſtance of all which is, *viz.* FIRST, here is no tenant at will: but admitting him to be ſo, he has no authority to make a deputy, and if he ſhould appoint a deputy, he executes the office without authority, and may ſuffer eſcapes. LASTLY, by pleading of this deed, he has alledged that the eſtate was in the truſtees, and that they permitted him to enjoy the office, *quorum prætextu* he did execute it and receive the profits: now this is too general, and an iſſue cannot be taken upon ſuch a plea; he ſhould have pleaded poſitively, that it was demiſed to him at will, and that he made a deputy: and then alſo the authority in *Rolls* is againſt him *(c)*, where it is held, that the marſhal of the king's bench may grant the office for life, but cannot give power to ſuch grantee to make a deputy. * Now if a tenant for life cannot make a deputy, certainly a tenant at will has no power ſo to do. But ſuppoſe a deputy might be made, his neglect in the execution of the office ſhall make a forfeiture of the eſtate of the grantee for life *(d)*. It cannot be reaſonably objected in this caſe, that it is any hardſhip for *Mr. Lenthal* to loſe this office for any defect in pleading; for admitting the plea to be good, yet there is a cauſe of forfeiture,

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1. Ld. Ray. 159. 853.

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(*a*) A conveyance or deviſe to truſtees in truſt to permit *A.* to *receive* the profits, is a uſe executed by the ſtatute 27. *Hen.* 8. c. 10. 2. Mod. 252.; but if lands are limited or deviſed to truſtees in truſt to *pay* over the profits, there is no ſuch uſe as can be executed by the ſtatute; for the lands muſt remain in the hands of the truſtees in order to perform the truſts. 1. Eq. Abr. 383. 1. Brown's Ch. Rep. 75. 2. Term Rep. 444. Sanders on Uſes and Truſts, 231.

(*b*) 1. Leon. 219. 5. Mod. 388. Co. Lit. 61. Ld. Ray. 159. 3. Bac. Abr. 726. 740.

(*c*) 2. Roll. Abr. 154.

(*d*) 2. Roll. Abr. 155.

becauſe

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because the marſhal of the king's bench, being a miniſterial officer, is required by law to be a perſon of ſuch ability as to anſwer all eſcapes, that ſo men may have the benefit of their ſuits, for otherwiſe, he having nothing to anſwer, they may loſe their debts. Now here by a ſecret grant *Mr. Lenthal* has conveyed the eſtate out of himſelf, and yet ſtill continues officer in poſſeſſion, by which means the people are deprived of the remedy which the law provides for them, and this is a ſufficient cauſe of forfeiture. Then as to the truſtees, they have not ſaid any thing of the eſcapes: it is true, *Mr. Lenthal* has traverſed theſe which are alledged to be voluntary, but that ſignifies nothing to them, becauſe they cannot take any benefit by the plea of another, for every one muſt ſtand and fall by his own plea. If therefore their non-attendance be a forfeiture, the intruders ſhall not help them, becauſe they come in without any colour of right.

But the counſel *on the other ſide* argued this laſt point firſt, which was thus: *viz.*

Quære, If the marſhal of the king's bench priſon grant the office to truſtees, with permiſſion to *him* to execute the office, and receive the profits, Whether the marſhal is tenant for life, or the truſtees bound to ſee the office duly executed?

A man ſeiſed of the inheritance of the office of marſhal of this court conveys it in truſt; the *ceſtui que truſt* enjoys it, and receives the profits; the queſtion now is, Whether the non-attendance of the truſtees, being never required by the Court, be a forfeiture of this office? And, as incident to this queſtion, it was debated, Whether *Mr. Lenthal* was tenant at will? It is no forfeiture, for they are not bound to attend. It cannot be denied but that this office doth concern the adminiſtration of juſtice; but it is to be conſidered what eſtate *Mr. Lenthal* hath in it. He had once an eſtate in fee, but if it had been for life or in tail, it may be ſettled as this is done, but not for years, becauſe it may then come to an adminiſtrator. * If *Mr. Lenthal* be the *ceſtui que uſe*, then he hath an eſtate of which the law takes notice, for he may be a juror at the common law *(a)*. It is plain that he has

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an eſtate created by operation of the law, for he is tenant at will, and for that reaſon the attendance of the truſtees is not neceſſary; but if the eſtate had been directly granted to them, then the office had been forfeited for non-attendance. It cannot be denied but that this office may be granted at will, for ſo is *Sir George Reynell's Caſe (b)*: now if it may be granted at will by the poſſeſſor, it may likewiſe be ſo granted by him who has an eſtate created by the law, for *fortior eſt diſpoſitio legis quàm hominis*; and in this caſe no inconveniency would happen; for if the will be determined, then the grantor is the officer *(c)*. When *Mr. Lenthal* had aſſigned this office to the truſtees, and they by a ſubſequent deed had declared it to be in truſt for him, and that he ſhould take the profits during life, he has thereby a legal eſtate at will; for a *ceſtui que truſt* by deed is a tenant at will. It has been objected, that a tenancy at will of an office is void; and to prove this, a caſe in *Jones's Reports (d)* was cited; but the reaſon of that

(a) Co. Lit. 404. Godb. 64.

(b) 9. Co. 98. Dyer, 176. pl. 28. 3. Bac. Abr. 734. and the caſes there cited. But ſee 27. *Geo.* 2. c. 17.

(c) Salk. 466.

(d) Jones, 128.

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case is guided by the particular nature of that office, which could not be aliened without the consent of the king. If this office be not alienable in its nature, then *Mr. Lenthal* has still the fee-simple; but that will not be admitted. But this is not only a bare estate at will, but a trust for life, and such a trust which has a legal construction (*a*); for if a feoffment be made in trust that he should convey the estate to another, which the feoffee afterwards refuse to do, the *cestuy que trust* may bring an action against him: so if he should be returned on a jury, it is no exception to say that he has not *liberum tenementum*; and therefore he is not an incompetent person to have the charge of prisons, if he may be impanneled on a jury to try men for their lives (*b*).

10. Mod. 74. 12. Mod. 79. Ante, 73. 2. Vern. 303. 754. Prec. Ch. 308. 8. Mod. 41. 10. Mod. 234. 506. 11. Mod. 146. Comyns, 423. 2. Peer. Wms. Cases T. T. 17. 252. 1. Stra. 243. 1. Peer. Wms. 128. 359. 387. 536 134. 379. 610.

* [150]

Quære, If a man be tenant at will of an office, Whether the appointment of a deputy be a determination of his estate?

Then as to THE FIRST QUESTION upon the last point, Whether *Mr. Lenthal* had done any thing to determine his tenancy at will? The grant of this office by him to *Cooling* will not amount to a determination of his will, because it is a void grant. * It is true, this is denied by my LORD COKE in his comment upon LITTLETON, where he says, "If tenant at will grant over his "estate, and the grantee entereth, he is a disseisor; for though the "grant be void, yet it amounts to a determination of his will (*c*)." What ground he had for such an opinion is not known; the Year Books quoted in the margin will not warrant it, for they are in no sort parallel (*d*). That case in the 27. *Hen.* 6. *pl.* 3. is no more than tenant at will cannot grant over his estate, because he has no certain or fixed interest in it; and much to the same purpose is the Book of 22. *Edw.* 4. *pl.* 5. there cited. But suppose this to be a void grant, and to amount to a determination of the tenancy at will, yet if the trustees had no notice of it, that shall not determine their estates. A devise to an executor that he shall have the oversight of the testator's estate till his daughter shall come of age; the executor made a lease at will rendering rent; before the year expired the daughter came of age, to whom the tenant at will attorned; the executor brought an action of debt against him for the rent arrear; it was held (*e*) that this attornment to the daughter was no determination of his will, for it would be of ill consequence to the lessor if such a tenant should determine his will a day or two before the end of the year, who had enjoyed all the profits of the land.

12. Mod. 610. 1. Stra. 674. 1. Ld. Ray. 707. 2. Ld. Ray. 1008.

Quære, Whether the marshal of the king's bench prison could appoint a deputy?

SECONDLY, Whether he may make a deputy? It is true, a *judicial officer* cannot make a deputy (*f*) unless he has a clause in his patent to enable him, because his judgment is relied on in matters relating to his office, which might be the reason of the making of the grant to him; neither can a ministerial officer de-

12. Mod. 466. 2. Ld. Ray. 1580. 2. Stra. 943.

(*a*) Godb. 64.
(*b*) 2. Roll. Abr. 647. Keilway, 92. Hob. 349.
(*c*) Littleton, sect. 71.
(*d*) 27. *Hen.* 6. pl. 3. 22. *Edw.* 4. pl. 5.
(*e*) Carpenter *v.* Collins, Yelv. 73. —See also Moor, 774. 1. Brownl. 88. and the case of Pigot *v.* Garnish, Cro. Eliz. 678. 734. Dyer, 36. 3. Bac. Abr. 409. Powel on Devises, 290.
(*f*) See Rex *v.* Clarke.

pute

REX against LENTHAL

pute one in his stead, if the office be to be performed by him in person; but when nothing is required but a superintendency in the office, he may make a deputy. This appears more evident in the common case of a sheriff, who is an officer made by the king's letters patents, and it is not said that he shall execute his office *per se vel sufficientem deputatum suum*, yet he may make a deputy, which is the under sheriff, against whom actions may be brought by the parties grieved *(a)*. And such a deputy may be made without a deed *(b)*, for he claims no interest in the office but as a servant; and therefore where an action on the case was brought against the deputy of a sheriff for an escape, who pleaded that the [151] sheriff made him * his deputy to take bail of prisoners, and that he took bond, &c. and shewed no deed of deputation, yet the plea was held good upon a demurrer *(c)*.

Quære, Whether the assignment of a trust of the office of marshal of the king's bench prison was a forfeiture?

THIRDLY, Whether the assignment of this trust without giving notice to this Court be a forfeiture? Tenant in fee simple may do it, for he has a power so to do by reason of the dignity of his estate. He who grants this office without acquainting of this Court therewith must remain an officer still, and is subject to all duties and attendance till the Court has notice of the grant. But there is no occasion to acquaint the Court in this case, for upon the grant made to the trustees by *Mr. Lenthal* he is still the officer, though he has not the same estate. It was objected, that *Sir Edward Norris, &c.* has not said any thing to the escapes; but that doth neither concern *Mr. Lenthal* nor the trustees; for if he be tenant at will they are not answerable for his neglect, for it is a personal *tort* in him *(d)*. If tenant for years make a feoffment, it is a forfeiture of his estate; but if he make a lease and release, though it is of the same operation, yet it will not amount to a forfeiture *(e)*. Now if any escapes should happen, there is a plain remedy for the parties aggrieved; for if tenant at will remain in possession of an office, and suffer voluntary escapes, his office shall be seized into the hands of this Court; then he in the reversion must make his claim; and when that is done, he is an officer *nolens volens*; and this was the *Duke of Norfolk's Case* *(f)*. Now,

2. Vern. 449. Prec. Ch. 108. 591. 11. Mod. 103. 2. Peer. Wms. 146.

(a) 1. Roll. Abr. 591. 1. Roll. Rep. 274. 1. Leon. 146. 3. Leon. 99. Cro. Eliz. 173. Moor, 845. 3. Bulst. 78. 1. Lev. 233. 3. Bac. Abr. 739.; and see Clecot *v.* Dennis, Cro. Eliz. 67.

(b) Clecot *v.* Dennis, Cro. Eliz. 67. 10. Co. 192. 1. Leon. 119.

(c) Now by 27. *Geo.* 2. c. 17. s. 7. The marshal shall have the appointment of all inferior officers, who shall hold their offices during good behaviour; and all grants of such inferior offices, otherwise made, are void: and it is provided, that as well the "marshal as the inferior officers shall be "liable to be amoved, by rule of court, "for non-residence, or other neglect of "duty, or any such misbehaviour as the "court of king's bench shall think "sufficient cause for such amoval, upon "any complaint made against such "marshal, or any such inferior officer, "by motion or petition in a summary "way."—See Bryant's Case, Trinity Term 32. *Geo.* 2. 4. Term Rep. 716.

(d) Cro. Jac. 17.

(e) 1. Roll. Abr. 855. 2. Leon. 60. 108. 2. Jones, 99. 6. Co. 15.

(f) Year Book 39. Hen. 6. 32. p. 45.

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though these escapes are found by the inquisition to be voluntary, yet they are answered in the plea, for that part of the inquisition is traversed, and that they were *vi et armis*; and this being not yet tried, the Court cannot give judgment thereon. If there be many negligent escapes, these shall not amount to a forfeiture; as if a rebel should break prison, or the prison should be on fire, those are negligent, but the officer should not be so much as fined. But if it should be a forfeiture, the neglect must be particularly alledged, for the word "*neglect*" is too general (*a*).

Rex *against* Lenthal.

1. Ld. Ray. 651. 11. Mod. 3. 79. 93. Comyns, 554.

Adjournatur (*b*).

(*a*) See Dyer, 66. and the Year Book 5. *Edw*. 4. pl. 27.

(*b*) By 27. *Geo*. 2. c. 17. s. 2. the prison of the Marshalsea of the court of king's bench, and the scite thereof, and the ground and appurtenances thereunto belonging, and the power of granting the custody of the said prison, and the office of marshal thereof, are revested in his majesty, his heirs and successors, and shall forever thereafter remain and be unalienable. See 4. Burr. 2183.

*[152]

* Anonymous.

Case 99.

A MAN was indicted for using of a trade, not being an apprentice, against the statute of 5. *Eliz*. c. 4.

The caption of an indictment, stating it as taken at a *general sessions*, is good, without naming any of the justices of the *quorum*.

And now a motion was made to quash it, because the act gives power to two justices of the peace, *quorum unus*, to hear and determine offences committed against any branch thereof, either by indictment or information before them in their sessions (*a*); and it is not said that one of the justices before whom this indictment was taken, was of the *quorum*.

The Court answered to this objection, that the sessions cannot be kept without one justice of the *quorum*.

2. Keb. 366. 1. Sid. 367. 1. Mod. 24. Cro. Eliz. 738. 10. Mod. 148. 11. Mod. 63. 113. 140. 167. 12. Mod. 251. 1. Stra. 552. 2. Stra. 788. 1. Ld. Ray. 767. 2. Ld. Ray. 1034. 1188. 1238. 2. Hawk. P. C. 360. 2. Ld. Ray. 1238. 3. Bac. Abr. 293. 1. Term Rep. 316.

Secondly, The act says, "That it shall not be lawful to any "person other than such who did then lawfully use any art, "mystery, or manual occupation, to set up any trade used within "this realm, except he had been an apprentice for seven years, "&c." and it is not averred that the trade mentioned in the indictment was a trade used before the making of the act. This seemed to be a material objection.

Quære, If in an indictment on 5. *Eliz*. c. 4. it must be averred *a trade* before the act? Post. 313.

See Rex *v*. Green, 2. Show. 210. Ld. Ray. 514. 1. Bl. Com. 428.

But the indictment was quashed for mis-reciting of the statute.

Mis-recital of a penal statute is fatal.

(*a*) See Farren *v*. Williams, that the *quarter sessions* may proceed by information *qui tam* on this statute, Cowp. 369.

Price

Case 100. **Price *against* Davies.**

Where a fine is acknowledged before commissioners, it may be assigned for error, that the cognisor died before the writ of covenant.—S. C. Comb. 57. 71. Ante, 99. 140. Owen, 21. 2. Sid. 54. 92. Dyer, 246. Cro. Jac. 468. 1. Burr. 360.

ERROR to reverse a fine taken by commission.—The error assigned was, that *the cognisor* died before the return of the *writ of covenant*. But this point was not argued *(a)*;

A writ of error to reverse a fine need not shew *how* he was related to the cognisor.

Cro. Jac. 160. 1. Show. 244. 1. Mod. 219, 220. 2. Mod. 70.; and see the case of Kellow *v.* Rowdon, Post. 253.—See 23. *Eliz.* c. 3. s. 2. and 10. & 11. *Will.* 3. c. 14.

Because ALLIBON, *Justice*, was of opinion that the plaintiff in the errors had not well entitled himself by the writ; for it was brought by him *ut consanguineus et hæres*, SCILICET *filius, &c.* but doth not shew how he was of kindred.

SIR WILLIAM WILLIAMS, *the Solicitor General*, replied to this objection, that if a descent be from twenty ancestors, it is not necessary to say that he was son and heir of such a one, who was son and heir of such a one, and so to the twentieth ancestor. Agreeable to this are all the precedents; in *formedons* it is only said that *jus descendit*.

Adjournatur (b).

(*a*) It is said, S. C. Comb. 57. and 71. that for this reason the fine was reversed. And by the case of Cockman *v.* Farrer, T. Jones, 181. it seems, that where the fine is acknowledged before *commissioners* it may be averred, that the cognizor died before the writ of covenant, or by 1. Roll. Abr. 757. that he died after the acknowledgement and before the certificate thereof; but by Wright *v.* Mayor of Wickham, Cro. Eliz. 468*. that where a fine is acknowledged *in court*, these facts cannot be alledged for error; for that in the first case they are consistent with the record, but in the second they are not. Cruise on Fines, 295

(*b*) This point of the case is not noticed in the report, S. C. Comb. 57. 71. The right to bring a writ of error always descends to the person who is entitled to the land, Henningham *v.* Windham, 1. Leon. 261.; and therefore if, after reversal, it appear that a plaintiff in error has no immediate title to the lands, as if there is a remainder-man before him, the Court will reverse their former judgment of reversal, 5. Mod. 396.; but a complete title need not be set forth in the writ; for it is only required of a plaintiff in error to shew the connection and privity between the person against whom the fine was levied, and the person who brings the writ of error. Sheepshanks *v.* Lucas, 1. Burr. 412.

*[153]

Case 101. **The Countess of Plymouth *against* Throgmorton.**

If *A.* appoint *B.* his collector, and "direct "*B.* to take "and receive "to his own "use 100l. out "of the first "money he collects," this is an *entire agreement*, and *B.* cannot bring an action of *debt* on it for 75l. as for three quarters of a year's salary.—S. C. Salk. 65. 8. Mod. 41. 1. Vern. 297. 460. 1. Ld. Ray. 360. 744. 1. Term Rep. 240.

ERROR to reverse a judgment in the common pleas in an action of debt upon a *mutuatus* brought by *Mr. Throgmorton* as executor to *Sir Edward Biggs*, against *the Countess* as administratrix of the *Earl of Plymouth*, wherein the plaintiff sets forth a writing by which *the Earl* had given power to *Sir Edward* to be the collector and receiver of his money and rents, and that he promised to allow him one hundred pounds *per annum* for his pains,

and

and in default of payment thereof, that *Sir Edward* ſhould detain the ſame, which writing was in the words following, *viz.* "I "do direct and appoint *Sir Edward Biggs* to take and receive "to his own uſe one hundred pounds of lawful money of *England*, "out of the firſt money which he ſhall receive of mine." The action was brought for ſeventy-five pounds, being his ſalary for three quarters of a year, and judgment by *nil dicit.*

THE COUNTESS OF PLYMOUTH *against* THROGMORTON.

It was argued this Term, and in *Eaſter Term* by counſel on both ſides.

It was agreed on all ſides, that *the Earl* left ſufficient *aſſets* to ſatisfy all his *bond creditors*, but not enough to pay debts upon *ſimple contract.*

FIRST, It was ſaid *for the plaintiff in the errors*, that no action of debt will lie againſt an executor upon a *mutuatus*, becauſe the teſtator might have waged his law, but this was not much inſiſted on *(a)*.

SECONDLY, That admitting an action would lie, yet this is an erroneous judgment, becauſe the ſuit was for ſeventy-five pounds for three quarters ſalary, when by the writing *Sir Edward* was to ſerve *the Earl* a whole year, and this being an *entire contract* ſhall not be ſeparated. Therefore he cannot be well entitled to the action unleſs his teſtator had ſerved a year, and he had averred it ſo in his declaration. As where a covenant was to pay two ſhillings for copying every quire of paper, and the breach was aſſigned that he copied four quires and three ſheets, for which eight ſhillings and three-pence was due to the plaintiff; it is true that he had judgment, but it was reverſed becauſe it was an entire covenant, of which no apportionment could be made *pro ratâ (b)*.

* THIRDLY, That which was chiefly inſiſted on was, to make theſe words amount to an obligation, that ſo it might be ſatisfied amongſt the bond creditors. *[154]

Quære, if *A.* appoint *B.* his collector, and give him a *paper writing* under hand and ſeal, directing him to retain 100*l* out of the firſt monies he ſhall receive, whether this is an *obligation?*

But thoſe who argued *for the plaintiff in the errors* ſaid, that it cannot be an *obligation*, for it was only a bare *letter of attorney*; an authority, and no more *(c)*; for there are no words to oblige *the Earl*, or which can make a warranty; and therefore if the money were not received, the party to whom the note was given could not reſort back to him who made it, had they been both living, neither ſhall the plaintiff now to his adminiſtratrix. Like the common caſes of the aſſigning of judgment, if the aſſignee do not receive the money, he cannot have an action againſt the aſſignor, who only directs and appoints him ſo to do.

But *on the other ſide*, THE SECOND OBJECTION was thus anſwered, *viz.* That this being only an executory thing, the plaintiff

(*a*) Godfrey's Caſe, 11. Co. 42.
(*b*) Yelv. 133. 7. Co. 10. Allen, 242.
(*c*) Co. Lit. 229. Comb. 87. 8 Mod. 10. Mod. 47. Comyns, 139. 2. Stra. 1146. 3. Bac. Abr. 690.

 may

THE COUNTESS OF PLYMOUTH *against* THROGMORTON.

may now bring an action for so long time as his testator served, and this may be apportioned *secundum ratam*; if the law should be otherwise, the case of all servants would be bad; for they are generally hired for a year, and do not usually serve so long. In an *assumpsit* to pay for a year's board, the plaintiff declared only for three quarters of a year, but yet had judgment *(a)*, because, as the Book says, if there be any variance in the agreement, it is for the advantage of the defendant.

8 Mod. 242. 10. Mod. 47. Comyns, 139. 2. Stra. 1146.

THE THIRD OBJECTION answered, *viz.* When a man is indebted to another by simple contract, which is acknowledged by deed, an action of debt will lie against his executor *(b)*; for any thing which is under hand and seal will amount to an obligation, especially where the debt is confessed. Now there are words in this deed to shew that money was due, and that makes it a bond.

But THE COURT was of opinion, that this was an *entire agreement*, and therefore the action not well brought for three quarters salary: and for this reason the judgment was reversed, *nisi, &c.*

* [155]

(a) 1. Sid. 225. (b) Vaugh. 92. Plowd. 182. Dyer, 21.

Case 102. * Chapman *against* Lamphire.

To say of *a trader*, "He is "broken and "run away, "and will never return again," is actionable. *Sed quære*, If spoken of *a carpenter*, and not laid that he got his living by buying and selling within the statutes of bankrupts?

S. C. Comb. 74. S. C. cited 10. Mod. 197. Ante, 112. 1. Roll. Abr. 59, 60. 1. Lev. 276. Ray. 207. Cro. Car. 31. 1. Bac. Abr. 249. 10. Mod. 111. 11. Mod. 220. 12. Mod. 307. 344. 420. Fitzg. 121. 253. 2. Stra. 696. 762. 797. 898. 1169. 1. Ld. Ray. 610. 2. Ld. Ray. 1417. 1480. 2. Burr. 1688.

AN ACTION ON THE CASE was brought for scandalous words spoken of the plaintiff; who declared, that he was *a carpenter*, and a freeman of the city of *London*, and that he got great sums of money by buying of timber and materials, and by building of houses; and that the defendant, having discourse of him and of his trade, spoke these words, *viz.* "He is broken and run away, and "will never return again." There was a verdict for the plaintiff.

A motion was now made in arrest of judgment, For that *a carpenter* was not a trade within the statute of bankrupts; and a day being given to speak to it again,

MR. POLLEXFEN, *for the plaintiff*, argued, that, before the statutes made against bankrupts, words spoken reflecting upon a man in his trade were actionable even at the common law, because it might be the occasion of the loss of his livelihood; and therefore it was actionable to say of *a scrivener*, that "He is "broken and run away, and dares not shew his face *(a)*;" and yet *a scrivener* was not within the statutes of bankruptcy before the act of 21. *Jac.* 1. c. 19.; therefore the action must lie at the common law, because these words disparage him in his trade.

But THE COUNSEL *for the defendant* said, that these words were not actionable, for they do not tend to his disparagement; he

(a) 1. Roll. Abr. 59. Hutton, 60. 610.; Stanton *v.* Smith, 2. Ld. Ray. —See also Read *v.* Hudson, 2. Ld. Ray. 1480.

may

may be broke, and yet as good *a carpenter* as before (*a*). The case of one *Hill*, in 2. *Car.* in this court, was much stronger than this; the words spoken of him were these: "*Hill* is a base broken rascal, "and has broken twice already, and I will make him break the "third time;" the plaintiff had judgment, but it was arrested (*b*). *A carpenter* builds upon the credit of other men, and so long as the words do not touch him in the skill and knowledge of his profession, they cannot injure him.

CHAPMAN *against* LAMPHIRE.

THE CHIEF JUSTICE. The credit which the defendant has in the world may be the means to support his skill, for he may not have an opportunity to shew his workmanship without those materials with which he is entrusted (*c*).

*[156]

* THE JUDGES were divided in opinion, two against two, and so the plaintiff had his judgment, there being no rule made to stay it, so that he had his judgment upon his general rule for judgment; but if it had been upon *a demurrer* or *special verdict*, then it would have been adjourned to the exchequer chamber.

On *motion*, the Court are divided the party shall keep the judgment, but not on *demurrer* or *special verdict*.—1. Ld. Ray. 272. 495.

(*a*) T. Jones, 156.

(*b*) Hill's Case, Latch. 114.

(*c*) And it seems now to be generally understood, that although no handicraft occupation, where nothing is bought or sold, will bring a man within the statute of bankrupt, Port *v.* Turton, 2. Wils. 171. 2. Bl. Com. 476. Crumpe *v.* Birne, Cro. Car. 31.; yet where persons purchase commodities for the purpose of manufacturing, and thereby making them more valuable, as *shoemakers*, *smiths*, and the like, here, though part of the gain is by bodily labour, and not by *buying and selling*, yet they are within the statute; for the labour is only in melioration of the commodity, and to render it more fit for sale, Cooke's Bank. Laws, 47.; and this, it is said, is the true distinction between a mere *working carpenter* and one who buys timber and materials for the carrying on his trade; and upon this distinction LORD HOLT held, that a *ship carpenter* may be a bankrupt, Kinney *v.* Smith, Ld. Ray. 741.

Goring *against* Deering.

Case 103.

APPEAL for the murder of *Henry Goring, Esq.* brought by his widow. The defendant pleaded, that he was indicted for the said *murder* at the *Sessions-house* in THE OLD BAILEY, in *Middlesex*; that he was found guilty of *manslaughter*, and not of murder, *prout patet per recordum*; that he was *clericus*, *et paratus fuit legere ut clericus*, if the Court would have admitted him; and that he is the same person, &c. To this plea the appellant demurred.

The truth of this case was, that after the conviction, and before the sentence, an appeal was brought, so that the defendant had not an opportunity to pray his book.

If a person on an *indictment* for *murder* be convicted of *manslaughter*, but before clergy allowed, or sentence passed, the widow of the deceased enter *an appeal* of murder, he cannot plead "*auterfois convict*, "and that he "was ready to pray his clergy," in bar to such appeal; for after appeal entered the Court cannot ask him what he has to say, so as to let him into the benefit of his clergy, and thereby defeat the appeal. *Tamen quære.*—S. C. Carth. 16. S. C. Comb. 89. S. C. 2. Show. 507. S. C. Trem. 15. 4. Co. 46. 3. Inst. 131. Co. Ent. 54. Kely. 94. 107. 1. Sid. 316. 2. Show. 375. 4. Mod. 100. 1. Salk. 63. 2. Leon. 160. 1. And. 68. 2. Hawk. P. C. 534. 536. Comyns, 257. 10. Mod. 86. 11. Mod. 228. 12. Mod. 109. 157. 349. 642. 1. Ld. Ray. 556.

GORING *against* DEERING.

MR. POLLEXFEN, *for the appellant*, argued, that if the statute of 3. *Hen.* 7. c. 1. were not in the way, this plea might be a good bar to the appeal, because before the making of that law, *auterfoits convict*, &c. had been a good plea, but now that statute deprives the defendant of that benefit; for it is enacted, "that if "any man be acquitted of murder at the king's suit, or the prin- "cipal attainted, the wife, or next heir to him so slain, may take "and have their appeal of the murder within a year and a day "after the said murder done, against the said persons so acquitted "or attainted if they be alive, and the benefit of clergy (*a*) before "not had." Now though the party be neither *acquitted* or *attainted*, but is only *convicted* of manslaughter, yet the word "*attaint*" in this statute signifies the same with "*convict*;" and this appears by the penning of the act in that clause which mentions the benefit of clergy, *viz.* "that if any man be *attaint-* "*ed* of murder, the heir shall have an appeal if the benefit of clergy [157] "be not had." Now an *attainder* supposes a *conviction*, for one is the consequence of the other; and if it should not signify the same thing in this place, then that clause would be in vain, because if it should be taken for the judgment given upon the conviction, then it is too late for the party to have any benefit of his clergy. Thus it was held in the second resolution of the case of *Wrot v. Wigg (b)*, that the word "attaint" in this very act shall not be intended only of a person who hath judgment of life, but also of one convict by confession or verdict. It is true, it is said in that case, and so likewise in *Holcroft's Case (c)*, that *auterfoits convict* of manslaughter upon an indictment of murder, is a good bar to an appeal at the common law, as well as if the clergy had been allowed; the reason may be, because in both those cases the judgments were by confession, so that the Court ought to have granted the clergy; but this is a conviction by verdict, which alters the case.

SIR GEORGE TREBY, *è contra for the appellee. Auterfoits convict* is a good plea at the common law in all cases (treason only excepted) at this day.

FIRST, It appears by the statute of 3. *Hen.* 7. c. 1. that the year and day, which was the time allowed for the appeal, and in which time the king's indictment could not be tried, was *a usage*, but not *a law*, therefore that act provides that the king shall proceed upon the indictment within the year and a day, and not stay for the appeal of the party. If the party be attainted or acquitted, the wife or next heir shall have an appeal, but not if he be convicted. But now admitting that the word "attaint" has the same signification with the word "convict," yet this is a good plea both within the words and the equity of the statute. This appears upon the

(*a*) *Nota*, At this time clergy was allowed for murder, but now taken away by the statute of 23. *Hen.* 8. c. 1. Hale's P. C. 232.—*Note to* FORMER EDITION.

(*b*) 4. Co. 46. a.

(*c*) 2. Ander. 68.

the conſtruction of that law, which muſt be expounded according to the vulgar ſenſe and ſignification of the words; and therefore where the ſtatute ſays, "that an appeal lies where the benefit of "clergy is not had," it means where it is not had *de jure*; but the clergy in this caſe was *de jure*, and the defendant was ready to read, if he had been admitted thereunto by the Court. Thus is the ſtatute of *Marlbridge* about the taking away of wards, *viz.* "*Si* "*parentes conquerunt*," that is, if they had cauſe to complain.

GORING against DELRING.

SECONDLY, This ſtatute has been expounded according to *equity*; for though it give an appeal to the wife or next heir of *him* ſlain, yet if a woman be killed, her next of kin ſhall bring an appeal. * Therefore by the ſame equity theſe words, *viz.* "the "benefit of clergy not had," ſhall be conſtrued "*had* by the grant "of the Court;" for if a man be indicted without the addition of *clerk*, he cannot demand his clergy unleſs the Court aſk him; but if he be indicted with that addition, then he may demand it, becauſe it is ſuppoſed by the Court that he can read.

1. Com. Dig. 365. 10. Mod. 93. 117. 242. 281. 356. 410. 3. Peer. Wms. 431. Co. Ent. 355.

* [158]

THIRDLY, That this appeal was not well brought theſe exceptions were taken, grounded upon the ſtatute of *Glouceſter*, 6. *Edw.* 1. c. 9. by which ſeven things are required in an appeal of murder; *viz.* that the appellor declare the *fact*, the *year*, the *day*, the *hour*, the *year of the king*, the *town* where the fact was done, and with what *weapon* the party was ſlain. Now in this caſe there is a defect in two of the things required by that ſtatute.

Quære, If an appeal of murder deſcribing *the hour* to have been *circa horam octavam* is ſufficiently certain?

2. Inſt. 318. 1. Bulſt. 82. Skin. 443. 4. Mod. 290. 1. Salk. 59.

FIRST, The hour is laid too general; for it is *circa horam octavam*, which is not certain enough.

1. Com. Dig. 371. 1. Bac. Abr. 127.

SECONDLY, They have laid no vill; for it is that the defendant did aſſault the huſband of the appellant *in parochiâ Sancti Martini in Campis*; now though that word "*parochia*" has crept into fines and recoveries, and likewiſe into indictments, it muſt not be allowed in appeals. There may be ſeveral vills in one pariſh; and though this is ruled good in indictments, it ought not to be ſo here, becauſe of the difference between an *indictment* and an *appeal*; for in indictments you need not mention the hour, but it muſt be done in appeals. A pariſh is an eccleſiaſtical diviſion, and though ſuch may be a vill, it is not neceſſary *ex vi termini* that it ſhould be ſo.

Quære, If an appeal of murder, ſtating the aſſault to have been made in *the pariſh of St. Martin's*, without naming *the vill*, be good?

Stamf. 80. b. Doct. & Stud. 48. 2. Inſt. 319. Carth. 17. Skin. 554. 8. Mod. 10. 4. Mod. 290. 1. Salk. 60. 2. Hawk. P. C. 265.

THE CHIEF JUSTICE afterwards, in *Trinity Term* 4. *Jac.* 2. delivered the opinion of all the Judges, who, except STREET, *Juſtice*, were aſſembled for that purpoſe at SERJEANTS INN, that this was no good plea, and that the Court ought not to aſk the priſoner what he had to ſay, and ſo to let him into the benefit of his clergy.

GORING *against* DEERING.

Tamen quære, for it is otherwise resolved *(a)*.

(a) This resolution to the contrary was in the case of Armstrong *v.* Lisle, Hilary Term, 8. *Will.* 3. *Lisle* was indicted at the Summer assizes at *Carlisle* for the *murder* of *Armstrong*, and found guilty of *manslaughter*. The brother and heir of the deceased, immediately after the verdict, exhibited his appeal; but before the appeal was arraigned, and after *Lisle* was taken from the bar, a friend prayed that he might be admitted to his clergy; and then the appeal was read in open court, and *Lisle* appeared to it, and prayed to be bailed, but refused to plead; upon which he was remanded to gaol. The prisoner and the proceedings against him were removed into the king's bench, where the prisoner pleaded the indictment and conviction of manslaughter at the assizes; that no judgment was given thereon; that he had prayed his clergy, and was ready to receive it if the Court would have admitted him thereto: and that afterwards, being demanded by the Court why judgment should not be given against him, he demanded the benefit of clergy, which was allowed to him. The question was, Whether this plea was good in bar of the appeal? And it was resolved by the whole Court to be a good plea, S C. Skin. 670. S. C. 1. Salk. 62. S. C. Kely. 93. It seems, therefore, to be fully settled by this case that a conviction of manslaughter on an indictment of murder, and the prayer of clergy thereupon, may be pleaded in bar of an appeal of the same death, whether such prayer were made upon the party being called to judgment or not, 2. Hawk. P. C. 536. And the law of this case has been since confirmed, in the case of Smith *v.* Taylor, Trinity Term, 11. *Geo.* 3. 5. Burr. 2801.

*[159]

Case 104.

The Company of Horners *against* Barlow.

A bye-law made by the Company of HORNERS of *London*, that none of the Company shall buy horns within *twenty-four miles* of *London*, except two persons appointed by the Company, is void; for they have not jurisdiction to that extent.

DEBT UPON A BYE-LAW, wherein the Company set forth, that they were incorporated by letters patents of *King Charles the First*, and were thereby empowered to make bye-laws for the better government of their corporation; and that the master, warden, and assistants of the Company made a law, *viz.* "that two * men appointed by them should buy rough horns for the Company, and bring "them to the hall, there to be distributed every month by the said "master, &c. for the use of the Company; and that no member "of the Company should buy rough horn within four-and-twenty "miles of *London* but of those two men so appointed, under a "penalty to be imposed by the said master, warden, &c.;" that the defendant did buy a quantity of rough horn contrary to the said law, &c. There was judgment in this case by default.

5. Co. 63. 3. Lev. 294. Savil, 74. 2. Jones, 145. Bridg. 139. Hob. 212. 10. Mod. 131. 338. 12. Mod. 270. 686. 1. Salk. 193. 143. 1. Bac. Abr. 341. 1. Wilf. 233. 2. Wilf. 266. 2. Peer. Wms. 207. Comyns, 269. 1. Ld. Ray. 498. 2. Ld. Ray. 1129. 1, Term Rep. 118. 11. Co. 54. Hob. 210

And *for the defendant* it was argued, that this was not a good bye-law —FIRST, Because it restrains trade *(a)*, for the Company are to use no *horns* but such as those two men shall buy, and if they should have occasion for more than those men should buy, then it is plain that trade is thereby restrained.—SECONDLY, The master, &c. has reserved a power which they may use to oppress the poor, because they may make what agreements they will amongst themselves, and set unreasonable prices upon those commodities, and let the younger sort of tradesmen have what quantity and at what rates they please.

(a) 11. Co. 54. Hob. 210. Post. 193.

THOMPSON,

THOMPSON, *Serjeant*, anſwered. FIRST, This bye-law is for the encouragement of trade, becauſe the horns are equally to be diſtributed when brought to the hall for the benefit of the whole Company (*a*).

But THE MATERIAL OBJECTION was, that this being a Company incorporated within the city of *London*, they have not juriſdiction elſewhere, but are reſtrained to the city, and by conſequence cannot make a bye-law which ſhall bind at the diſtance of four-and-twenty miles; for if they could make a law ſo extenſive, they might, by the ſame reaſon, enlarge it all over *England*, and ſo make it as binding as an act of parliament.

And for this reaſon it was adjudged no good bye-law.

(*a*) See the caſe of Pierce *v*. Bartrum, Cowp. 270.

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Sir John Wytham *againſt* Sir Richard Dutton. Caſe 105.

To an action of treſpaſs and falſe impriſonment, A PLEA that the defendant was governor of *Barbadoes*; that he appointed the plaintiff deputy-governor during his abſence; that the defendant did *malè et arbitrariè* execute the ſaid office; and that by powers veſted in him for that purpoſe he called A COUNCIL, before whom the defendant was charged with, and committed to the cuſtody of the PROVOST MARSHAL for *mal-adminiſtration*; which is the ſame aſſault and impriſonment, &c.; is a good *juſtification*; for an action will not lie againſt a perſon for acts done in the character of A JUDGE.—S. C. 13. Vin. Abr. 424. S. C. Show. Caſes in Parl. 24. 6. Mod. 195. 2. Salk. 625. Cowp. 166. Dougl. 594. 1. Term Rep. 493. Ld. Ray. 1447.

ASSAULT AND FALSE IMPRISONMENT, on the fourteenth day of *October* in the thirty-ſixth year of *Charles the Second*, &c.

The defendant as to the aſſault before the ſixth day of *November* pleads *not guilty*, and as to the falſe impriſonment on the ſaid ſixth day of *November* in the ſame year he made a ſpecial juſtification, *viz.* * That on the twenty-eighth of *October* in the thirty-ſecond year of *Charles the Second*, &c. the king by his letters patents did appoint the defendant to be captain-general and chief governor of *Barbadoes*, and ſo ſets forth the grant at large, by which he appoints twelve men to be of the king's council during pleaſure, of which the plaintiff *Wytham* was one; that the defendant had alſo power by the advice of that council to appoint and eſtabliſh courts, judges, and juſtices, and that the copies of ſuch eſtabliſhments muſt be ſent hither for the king's aſſent, with power alſo to eſtabliſh a deputy-governor; that by virtue of theſe letters patents the defendant had appointed *Sir John Wytham* to be deputy-governor of the ſaid iſland in his abſence; and that he being ſo conſtituted did *malè et arbitrariè* execute the ſaid office; that when the defendant returned to *Barbadoes*, *viz.* 6. *November* 35. *Car.* 2. he called a council, before whom the plaintiff was charged with *mal-adminiſtration* in the abſence of the defendant, *viz.* That he did not take the uſual oath for obſerving of trade and navigation; that he aſſumed the title of lieutenant-governor; and that decrees made in court were altered by him in his chamber: upon which it was then ordered that he ſhould be committed to the provoſt-marſhal until diſcharged by law, which was done accordingly; in whoſe cuſtody he remained from the ſixth day of *November* to the twentieth of *December* following, which is the ſame impriſonment, &c.

To

Sir John Wytham *against* Sir Richard Dutton.

To this plea the plaintiff demurred; and the defendant joined in demurrer.

12. Mod. 396. 1. Ld. Ray. 309. 2. Ld. Ray. 1160. 1530. 1. Stra. 509. 2. Stra. 1184.

Mr. Pollexfen argued *for the plaintiff*, First, That the causes of his commitment, if any, were such as they ought not meddle withal, because they relate to his misbehaviour in his government, for which he is answerable to the king alone. But supposing they might have some cause for the committing of him, this ought to be set forth in the plea, that the plaintiff might answer it; for to say that he did not take the oath of deputy governor in what concerned trade and navigation is no cause of commitment, because there was nobody to administer that oath to him, for he was governor himself. Then to alledge that he altered in his chamber some decrees made in the court of chancery, that can be no cause of commitment, for the governor is chancellor there. * [161] * Besides, the defendant does not shew that any-body was injured by such alterations; neither doth he mention any particular order, but only in general; so it is impossible to give an answer to it.

Secondly, He does not alledge that the plaintiff had made or done any of these things, but that he was charged to have done it; and *non constat* whether upon oath or not.

1. Vern. 460. 469. 9 Mod. 101. 2. Peer. Wms. 262.

Thompson, *Serjeant, for the defendant.*—The governor has a large power given by these letters patents to make laws such as he, by consent of a general council, shall enact. The fact is set forth in the plea; the plaintiff was committed by virtue of an order of council, until he was brought to a general court of *oyer* and *terminer*, by which court he was again committed. That the court had power to commit him is not denied, for the king is not restrained by the laws of *England* to govern that island by any particular law whatsoever, and therefore not by the common law, but by what law he pleases; for those islands were gotten by conquest, or by some of his subjects going in search of some prize, and planting themselves there (*a*). The plaintiff being then committed by an order of council "till he should be discharged by due course of "law," this Court will presume that his commitment was legal.

The Court were all of opinion that the plea was not good; so judgment was given for the plaintiff. But afterwards, in the fifth of *William and Mary*, this judgment was reversed by the house of peers (*b*).

(*a*) See Calvin's Case.

(*b*) See Mostyn *v.* Fabrigas, Cowp. 161.; Johnston *v.* Sutton, 1. Term Rep. 493.; Sutherland *v.* Murray, 1. Term Rep. 538.

Sir Robert Jefferies *against* Watkins. Case 106.

THIS was an action brought for a duty to be paid for weighing of goods at THE COMMON BEAM of *London*, setting forth, that the lord mayor, &c. time out of mind kept a common beam and weights, and servants to attend the weighing of goods; and that the defendant bought goods, &c. but did not bring them to the beam to be weighed, *per quod proficuum amisit*. Upon not guilty pleaded, there was a verdict for the plaintiff.

In an action on the case for not bringing goods *sold* to the common beam, the omission of stating that the goods were sold *by weight* is aided *after verdict*.

It was moved in arrest of judgment, that the plaintiff had not brought himself within the perscription, for he doth not * say that the defendant sold the goods by *weight*, and this is a fault which is not helped by a verdict. This had been certainly naught upon a demurrer, and being substance is not aided by this verdict. This is substance, for the duty appears to be wholly in respect of the weights which are kept; now weighing being the principal, and it being no-where alledged that the goods were weighed elsewhere, or that they were such which are usually sold by weight, then there is no need of bringing of them to the beam. If one prescribe to a common, and do not say for cattle *levant et couchant*, the prescription is not good. This being the consideration of the duty, it ought to be precisely alledged; as in an *assumpsit*, where the plaintiff declared, that in consideration that the defendant owed him forty pounds he promised to pay it *ante inceptionem proximi itineris* to *London*, and alledged that such a day *incepit iter suum ad London*. but for omitting the word *proxime* judgment was arrested after verdict *(a)*, because the duty did arise upon the commencement of his next journey. The true reason why any-thing is helped by verdict is, for that the thing shall be presumed to have been given in evidence at the trial *(b)*.

* [162]

S. C. Carth. 6. Cro. Car. 497. Ray. 487. 2. Jones, 145. 1. Mod. 169. 1. Show. 308. Stra. 212. 5. Com. Dig. "Pleader" (C. 87.). B. R. H. 116. 2. Burr. 924. 4. Burr. 2018. Cowp. 826. 1. Term Rep. 141. Fitzg. 54. 62. Ld. Ray. 815. 10. Mod. 149. 254. 295. 330. 1. Stra. 94. 592. 2. Stra. 953. Post. 246. 10. Mod. 145. 184. 210. 1. Ld. Ray. 726. 2. Ld. Ray. 1015.

MR. POLLEXFEN, *contra*. Here is enough set forth in the plea to shew that the goods were not weighed, and it must be given in evidence at the trial that they were sold contrary to the custom, which is the only offence to be proved. The want of averment that the goods sold by the defendant were not weighed, shall not vitiate this declaration after a verdict. To prove this, some authorities were cited; as where, in trespass, the defendant justified for common by prescription, for beasts *levant et couchant*, and that he put in his beasts *utendo communia*; and issue was taken upon the *prescription*, and found for the defendant; and though he did not aver that the cattle were *levant et couchant*, yet it was held that it was cured by a verdict *(c)*.

And of this opinion were THREE JUDGES now:

(a) Yelv. 175. Cro. Jac. 245.
(b) 10. Mod. 229. 12. Mod. 510. 2. Ld. Ray. 1061. Fitzg. 174. 275. 1. Stra. 1011.
(c) Corbyson v. Pearson, Cro. Eliz. 458. Cro. Jac. 44. 1. Sid. 218. Palm. 260. Cro. Car. 497. 1. Com. Dig. 331. 2. Saund. 324.

But

Sir Robert Jefferies against Watkins.

But Allibon, *Justice*, differed; "for," says he, "if this declaration should be good after a verdict, then a verdict will cure any "fault in pleading."

Judgment for the plaintiff.

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Case 107.

* Prowse *against* Wilcox.

To say of a *justice of the peace*, "He is a knave, "a busy knave, "for searching "after me, and "I will make "him give me "satisfaction for "plundering "me," is actionable. Ante, 71.

An action on the case for scandalous words.—The plaintiff declared, that he was a justice of the peace for the county of *Somerset*; that there was a rebellion in *the West* by the *Duke of Monmouth* and others; that search was made for the defendant, being suspected to be concerned in that rebellion; and that the defendant thereupon spoke these words of the plaintiff, viz. *John* "*Prowse* is a knave, and a busy knave, for searching after me and "other honest men of my sort, and I will make him give me satisfaction for plundering me." There was a verdict for the plaintiff, and the judgment stayed till the return of the *postea*.

4. Co. 16. 1. Roll. Abr. 57. 59. Cro. Car. 14. 1. Vent. 50. 1. Sid. 432. Cro. Jac. 56. 90. 143. 240. Cro. Eliz. 536. 1. And. 120. Hard. 501. Stra. 617. 1168. Fort. 206. 1. Com. Dig. 181. Ld. Ray. 153. 1029. 1369.

Mr. Pollexfen moved, that the plaintiff might have his judgment, because the words are actionable, for they touched him in his office of a justice of peace. It was objected, that the words are improper, and therefore could not be actionable. But admitting them so to be, yet if they in any wise reflect upon a man in a public office, they will bear an action.

Shore, *contra*. The plaintiff does not lay any *colloquium* of him as a justice of the peace, or that the words were spoken of him relating to his office, or the execution thereof; and therefore an action will not lie, though an information might have been proper against him *(a)*. If a man should call another "*lewd fellow*," and say that "he set upon him in the highway, and took his purse "from him," an action will not lie, because he does not directly charge him with felony or robbery (*b*).

so

(*a*) *Vide* ante, 139. Rex *v.* Darby.

(*b*) The case of Holland *v.* Stoner, Cro. Jac. 315. See also Latham *v.* Humphrey, Cro. Eliz. 890.; and Laurance *v.* Woodward, Cro. Car. 277.

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Case 108.

* Boyle *against* Boyle.

A Libel was in the spiritual court against a woman *causâ jactitationis maritagii*. The woman suggests, that this person was indicted at the sessions in the *Old Bailey* for marrying of her

If a man libel in the spiritual court *pro jactitatione maritagii* after he has been convicted of *bigamy* in marrying the woman against whom he libels, a *prohibition* shall go; for a conviction in a court of criminal jurisdiction is conclusive evidence of the fact.—S. C. Comb. 72. Godb. 507. Hales, 121. 1. Sid. 171. Cro. Jac. 625. 2. Inst. 614. 8. Mod. 181. 10. Mod. 386. 11. Mod. 224. 12. Mod. 35. 319. 339. 419. 432. 610.—Gib. E. R. 156. Fitzg. 164. 175. 276. 1. Stra. 79. 2. Stra. 960. Salk. 548. Bull. N. P. 245. 4. Bac. Abr. 257, 258. 2. Wils. 124. 1. Hale P. C. 121. 2. Term Rep. 649.

(he

(he then having a wife living) *contra formam statuti (a)*; that he was thereupon convicted, and had judgment to be burned in the hand; so that being tried by a jury and a court which had a jurisdiction of the cause, and the marriage found, a *prohibition* was prayed *(b)*.

BOYLE *against* BOYLE.

LEVINZ, *Serjeant*, moved for a *consultation*, because no court but the ecclesiastical court can examine a marriage; for in dower the writ is always directed to the bishop to certify the lawfulness of the marriage; and if this woman should bury this husband and bring a writ of dower, and the heir plead *ne unques accouple, &c.* this verdict and conviction shall not be given in evidence to prove the illegality of the marriage, but the writ must go to the bishop *(c)*. This is proved by the case of *Emerton v. Hide (d)* in this court. The man was married in fact, and his wife being detained from him (she being in the custody of *Sir Robert Viner)* brought an *habeas corpus*; she came into the court; but my LORD HALE would not deliver the body, but directed an ejectment upon the demise of *John Emerton* and *Bridget* his wife, that the marriage might come in question; it was found a marriage; and afterwards, at an hearing before the delegates, this verdict was not allowed to be given in evidence, because in this court one jury may find a marriage and another otherwise; so that it cannot be tried whether they are legally married by a temporal court. It is true, this Court may control the ecclesiastical courts, but it must be *eodem genere*.

E contra. It was said, that if a prohibition should not go, then the authority of those two courts would interfere, which might be a thing of ill consequence: if the lawfulness of this marriage had been first tried in the court christian, the other court at the *Old Bailey* would have given credit to their sentence. But that court has been prohibited in a case *(e)* of the like nature; for a suit was there commenced for saying, "that he had a bastard;" * the defendant alledged, that the plaintiff was adjudged the reputed father of a bastard by two justices of the peace according to [165] the statute of 18. *Eliz.* c. 3.; and so justified the speaking of the words; and this being refused there, a *prohibition* was granted.

And so it was in this case, by the opinion of three Judges.

DR. HEDGES, *a civilian*, being present in the court, said, that "marriage or no marriage" never comes in question in their court upon a libel for *jactitation*, unless the party replies "a lawful "marriage;" and that the spiritual court ought not to be silenced by a proof of a marriage *de facto* in a temporal court; for all marriages ought to be *de jure*, of which their courts had the proper jurisdiction.

(a) The statute 1. *Jac.* 1. c. 11.

(b) But see the case of the Duchess of Kingston, Cases in Crown Law, 132.

(c) Lord Howard *v* Lady Inchiquin, Bull. N. P. 245. *in marg.*

(d) Hob. 288.

(e) Webb *v.* Cook, Cro. Jac. 553. 625.; and see the case of Rex *v.* Rislip, where it is adjudged, that the filiation of a bastard by two justices precludes the adjudged father, as to all the world, from saying he is not the father. 1. Ld. Ray. 394.

Sir

Case 109. Sir John Newton *against* Francis Creswick.

An action on the case for maliciously exhibiting a petition against the plaintiff must be laid in the county where the petition was exhibited, although it contain matter done in another place.

IN AN ACTION ON THE CASE, wherein the plaintiff declared, that the defendant exhibited a petition against him and *Sir R. H.* before the king in council, by reason whereof he was compelled to appear at a great expence, and that he was afterwards discharged of the matter alledged against him; which was the erecting of cottages in *Kingswood Chase* in the county of *Gloucester*;

This action was first laid in *Gloucestershire*, and the defendant moved that it might be laid in *Middlesex*, where the petition was exhibited.

1. Term Rep. 571. 647. 782. 2. Term Rep. 199.

But it was insisted *for the plaintiff*, that where a cause of action arises in two places, he has his election to lay it in either.

THE COURT held, that the exhibiting of the petition was the ground of the action, and though it contained matter done in another place, yet it shall be tried in the county where the petition was delivered; for suppose the petition had contained matter done beyond sea, &c. (*a*).

A *plea* which amounts to the *general issue* is bad on *demurrer*

Co. Lit. 303. 1. Sid. 106. Cro. Eliz. 201. 5. Mod. 253. 314. 1. Vern. 105. 2. Vern. 32. 8. Mod. 228. Gilb. E. R. 183. 3. Peer. Wms. 90. 405. 12. Mod. 399. 408. 515 1. Salk. 394. Fort. 378. 1. Wils. 174. 5. Com. Dig. "Pleader" (E. 14.).

Now in this case, the action being brought in *Middlesex*, the defendant pleaded, that THE CHASE was injured by the erecting the said cottages; by the digging of pits; and by the making of a warren by *Sir John Newton*; and that the other person *Sir R. H.* being then a justice of the peace for the county of *Gloucester*, upon complaint to him made, did not impose penalties upon the offenders, but did abet the said plaintiff, by reason whereof the deer were decreased from one thousand head to four hundred. To this plea the plaintiff demurred.

(*a*) In the case of Lyde *v.* Rodd, 1. Brown's Cases in Parl. 328. it was held, that in an action for damages against an attorney for filing a bill in chancery without any authority from, or even with the knowledge, of the plaintiff, which was afterwards dismissed with costs, and the plaintiff obliged to pay those costs, that he may lay his *venue* either in the county where the court of chancery is held, or in the county where he actually paid the money. So also in Scott *v.* Brest, 2. Term Rep. 238. where *A.* by deed indented in *London* for securing the re-payment of money lent to *B.* was appointed receiver of *B.*'s rents in *Middlesex*, with a pretended salary, which enabled him to retain usurious interest, and he received the rent in *Middlesex*, but settled the account in *London*, and *there* paid the balance on which the usurious interest was allowed, it was held, that the *venue* might be laid in either county. In an action for *a libel*, however, the Court will not change the *venue* on the ground that the cause of action arises where the paper is *printed* and *published*, Pinkney *v.* Collins, 1. Term Rep. 571.; Clifford *v.* Clifford, 1. Term Rep. 647. But if it was both *written* and *published* in one place, they will change the *venue* to that county, *Freeman v. Norris*, 3. Term Rep. 306.; or if written in *Yorkshire*, and sent by the post into *Germany*, the *venue* may be changed from *London* to *Yorkshire* on the usual affidavit, Metcalf *v.* Markham, 3. Term Rep. 652.

Mr.

*MR. POLLEXFEN argued against the plea, first, that it charged *Sir R. H.* with no particular crime, but enlarges the matter upon the plaintiff, and amounts to no more than the *general issue*; for the question is, Whether the defendant has falsely prosecuted the plaintiff before the king in council? which is only matter of fact, and which is charged upon the defendant, and therefore he ought to have pleaded not guilty. It is true, where the defence consists in matters of law, the defendant may plead specially; but where it is purely fact, the general issue must be pleaded.

SIR JOHN NEWTON *against* FRANCIS CRESWICK.

8. Mod. 120. 227. 289. 307. 10. Mod. 145. 210. 217. 304. 12. Mod. 97. 121. 316. 376. 537. Fitzg. 174. 1. Barnes, 74. 318. 1. Stra. 114. 691. 1. Ld. Ray. 88. 393. 566. 2. Ld. Ray. 869.

E CONTRA. It was insisted upon, that what is alledged in this plea might be given in evidence upon the general issue, but the defendant may likewise plead it specially, and not trust the matter to the *lay-gents*. As in conspiracy for procuring of the plaintiff to be falsly and maliciously indicted of a robbery; the defendants plead that they were robbed, and suspecting the plaintiff to be guilty, procured a warrant in order to have the plaintiff examined before a justice of the peace, of which he had notice, and absented himself, but was afterwards committed to the gaol by a Judge of this court, who advised them to prefer a bill of indictment, &c. *quæ est eadem conspiratio*; this was adjudged a good plea, though it amounted to no more than the general issue; and all this matter might have been given in evidence at the trial (*a*).

THE COURT, except ALLIBON, *Justice*, advised the plaintiff to waive his demurrer, and the defendant to plead the general issue.

But ALLIBON, *Justice*, took an exception to the declaration, for that the plaintiff had not alledged any *damnification*, but only that he was compelled to appear, and doth not shew how, either by the petition of the defendant, or by summons, &c. He ought to set forth that he was summoned to appear before the king in order to his discharge, but to say *coactus fuit comparere* is incertain, for that might be in the vindication of his honour or reputation.

In an action on the case for a malicious prosecution, the plaintiff must shew special damage.

He complains of a petition exhibited against him, which the defendant has answered by shewing to the Court sufficient matter which might reasonably induce him so to do; and for that reason he held the plea to be good.

Probable cause is a good plea to an action for a malicious prosecution.

Sed adjournatur.

1. Term Rep. 493.

(*a*) Cro. Eliz. 871. 900. 21. *Edw.* 3. Moor, 600. Rast. Ent. 123.—*Sed nota*, pl. 17. 27. Ass. 12. Keilway, 81. This defence was matter of law.

Case 110. * Rex *against* Hockenhul.

A misprision of the clerk in the caption of an information for a riot may be amended.

S. C. Comb. 73. 2. Keb. 656. 2. Sid. 175. 1. Saund. 249. Cro. Jac. 276. 2. Hawk. P. C. 348. Cowp. 407. Dougl. 115. 135. 1. Term Rep. 783.

AN INFORMATION was exhibited against him for *a riot*; of which he was found guilty.

This exception was taken in arrest of judgment. "MEMO- " RANDUM *quod ad general. quarterial. session. pacis tent. &c.* " *die sabbati prox. post Quindenam Sancti Martini præsentat. ex-* " *istit quod* the defendant 27. *die Januarii* in such a year *vi et* " *armis, &c.*" So the fact is laid after the indictment, which was exhibited against the defendant at the *Michaelmas* sessions, and the fact is laid to be in *January* following in the same year.

But THE ATTORNEY GENERAL said, this was only *a misprision* of the clerk in titling the record, *viz.* in the MEMORANDUM, and there was no fault in the body of the information, and that it was amendable at the common law: he cited some cases to prove where amendments have been in the cases of subjects of greater mistakes than here, *à fortiori* it ought to be amended in the king's case *(a)*.

CURIA. It is not only amendable at the common law, but by several statutes, which extend to all misprisions of clerks except treason, felony, and outlawry *(b)*.

Wherefore this mistake of *Quinden. Martini* was amended, and made *Quinden. Hilarii.*

(*a*) 10. Assize, pl. 26. 4. *Hen.* 6. pl. 16. 8. Co. 156. Cro. Car. 144.

(*b*) 4. *Hen.* 6. c. 3. and 8. *Hen.* 6. c. 12. Jones, 421.

Case 111. Rex *against* Sellars.

Quære, If the charter exempting the members of a Company from serving on juries or inquest before the mayor, &c. will exempt them from the wardmote inquest.

S. C. 2. Show. 525. 10. Mod. 65. 297. 11. Mod. 142. 215. 227. Stra. 920. 1146. 1193. 1268. Dougl. 188. 1. Term Rep. 686.

THE defendant was indicted at the sessions in *London* for not attending at the *Wardmote Inquest*, being chosen of the jury for such a year.

To this indictment he pleaded the king's grant *(a)* to the *Company of Cooks*, of which he was a member; by which grant that Company is exempted from being put or summoned upon a jury or inquest before the mayor, or sheriffs, or coroner of *London, &c.*

And upon a demurrer the question was, Whether *the Cooks* are discharged by this grant from their attendance at the said wardmote inquest?

HOLT, *Serjeant, for the king*, argued, that they are not discharged. Before the judgment upon the *quo warranto* brought against the city of *London* (*b*) these courts there were like the hundred

(*a*) See this grant stated at length, 2. Show. 526.
(*b*) 3. State Trials, 545. 2. Show. 263.

courts

Rex *against* Sellars.

courts in the county; for as these were derived out of the county, so those were derived from the lord mayor's court, which is a court of record, and erected for the better government of the city, and the aldermen of every ward had right to hold leets there (*a*). But First, the words of this grant do not extend to this case, for *the Cooks* are thereby discharged only from being of a jury "before the mayor, sheriffs, or coroner, &c." but "the court of wardmote" is held before neither, for it is held before the alderman of the ward. Secondly, The words in this grant ought to be taken strictly, *viz.* that *Cooks* shall be exempted if there be other sufficient men in the ward to serve besides; and if this do not appear, the grant is void; but this is not alledged (*b*).

Shower, *è contra*. As to the first exception, it was said that the *wardmote court* was held before the mayor, for the juries there are not to try any matter, but only to make presentments, which are carried before the mayor.

An indictment for not taking the office of one of the wardmote inquest must shew a liability to serve, and state *the act* by which the defendant refused to accept the office, or perform the duties of it.

Exceptions were taken against the indictment, which was for not serving at a wardmote inquest for such a year. First, Because it is a thing not known at the common law that a man should be of a jury for a whole year. Secondly, The indictment was, that the defendant was an inhabitant of such a place, and elected a juryman; but does not say that he ought to hold the office to which he was elected.

It was quashed (*c*).

(*a*) 4. Inst. 249.
(*b*) Dyer, 269.
(*c*) The indictment charged, that the defendant, on the 21st of December, was elected one of the wardmote inquest for one year next ensuing, and had notice thereof; but that from the 21st day of December aforesaid until the finding of the bill, he had wilfully, obstinately, and contemptuously, refused to take upon him and perform the duties of the office; and the indictment was quashed, because it did not state when the duty was to be performed; nor that any oath was tendered to him; nor that he was present at any court, or summoned to be at any court; for that to support such an indictment it must be stated, that some part of the duty to be performed had been neglected. But another indictment was preferred and found, to which the defendant, contrary to the inclination of *the Company*, submitted; so that the matter of *the plea* was never judicially determined. S. C. 2. Show. 519.

Calthrop *against* Axtel. Case 112.

A mother, being *guardian* to two infant daughters, heiresses, lets the lands, as tenant in possession, and covenants with the lessees for quiet enjoyment: *quære*, If an ejectment be brought on the part of one of the daughters against the other, under the 4. & 5. *Phil. & Mary*, c. 8. for marrying under sixteen without consent, whether the mother is an admissible witness? Ante, 85.

THE husband being seised in fee, had issue two daughters, and died. His wife survived, and was then by law guardian in socage to her children. One of the daughters, under the age of sixteen years, married one *Mr. B.* without her mother's consent,

by

CALTHROP *against* AXTEL.

by reason whereof her estate became forfeited during life to her sister by virtue of the statute of 4. & 5. *Philip* and *Mary*, c. 8. who now brought an ejectment, which was tried at the bar.

The mother was produced as a witness at this trial against the married daughter.

But it was objected against her, that she was tenant in possession of the lands in question under her other daughter (*a*); that some part of the estate was in houses; and that she had made leases * [169] thereof to several tenants for ninety-nine * years, &c. and covenanted with the lessees, that she, together with the infants, when of age, " shall and will join to do any further act for the quiet " enjoyment thereof;" therefore this is like the case of a bailiff or steward, who if they put themselves under such covenants, shall never be admitted as witnesses in any cause where the title of such lands shall come in question.

Ante, 127. 8. Mod. 22. 214. 9. Mod. 68. 12. Mod. 562. Gilb. E. R. 149. 177. Prec. Ch. 171. 230. 492. 1. Stra. 444. 597. 2. Stra. 682. 2. Ld. Ray. 1334.

The proofs that the mother did not consent were, that she made affidavit of the whole matter, and got the Lord Chief Justice's warrant to search *Mr. B.*'s house for her daughter; and upon application made to my lord chancellor, she obtained a writ of *ne exeat regnum*, and got a *homine replegiando*, and gave notice of the fact in THE GAZETTE, and exhibited an information in the crown-office against *Mr. B.* and his father, and his maid.

12. Mod. 516. Comyns, 27. Cases T. T. 58 Stra. 1107. 3. Peer. Wms 116. 154.

THE ATTORNEY GENERAL, *contra*. The preamble of this act will be a guide in this case, which is, " For that maids of " great substance in goods, &c. or having lands in fee, have by " rewards and gifts been allowed to contract matrimony with " unthrifty persons, and thereupon have been conveyed from their " parents by sleight or force, &c." then it enacts, " that no " person shall convey away a maid under sixteen years without " her parents consent;" which assent is not necessary within the meaning of this act, unless the child be taken away either by *sleight* or *force*, which must be proved. The mother was no good guardian to these children; for she did set up one G. to be a curator for her daughter in the spiritual court, to call herself to an account for the personal estate of which her husband died possessed, she having given security to exhibit a true inventory. This account was stated in the prerogative court between her and the curator to three hundred pounds only, for which she gave bond; when in truth the personal estate was worth more, and afterwards obtained a decree in chancery, thinking thereby to bind the interest of the infants.

In this case it was said, that there must be a continued refusal of the mother; for if she once agree, though afterwards she dissent, yet it is an assent within the statute.

Under 4 & 5. *Phil. & Mary*, c. 8. if the guardian consent he cannot retract.—2. Mod. 128. 1. Hawk. P. C. 173. 1. Vern. 354. 2. Vern. 580. Prec. Ch. 594.

There must likewise be proof of the stealing away.

See Hulse v. Gore, ante, 84.

(*a*) It is determined, that a tenant in possession is not a good witness to prove his landlord's possession, or to support his title, because it is to uphold his own possession. Doe v. Foster, Cowp. 621.

Obrian

* Obrian *against* Ram.

Case 113.

Michaelmas Term, 3. Jac. 2. Roll 192.

Angl. ss. DOMINUS REX *mandavit prædilecto et fideli consiliario suo* WILLIELMO DAVIS, *militi, Capitali Justic. suo ad placita in curia ipsius domini regis coram ipso rege in regno suo* HIBERNIÆ *tenend. assign. breve suum clausum in hæc verba. ss.* " JACOBUS SECUNDUS *Dei gratia Angliæ, Scotiæ, Franciæ, et Hiberniæ, Rex, Fidei defensor. &c. prædilecto et fideli consiliario nostro* WILLIELMO DAVIS, *militi, Capital. Justic. nostro ad placita in curia nostra coram nobis in regno nostro* HIBERNIÆ *tenend. assign. salutem.* QUIA *in recordo, et processu, acetiam in redditione judicii loquelæ quæ fuit in curia nostra coram nobis in præd. regno nostro* HIBERNIÆ, *per billam, inter* ABEL RAM, *mil. nuper dict.* ABEL RAM *de civitate* DUBLIN, *alderman. et* ELIZABETHAM GREY *de civitate* DUBLIN, *viduam, de quodam debito quod idem* ABEL *à præfat.* ELIZABETHA *exigebat; quæ quidem* ELIZABETHA *postea cepit* DONNOGH OBRIAN, *armigerum, in virum suum et obiit;* NEC-NON *in adjudicatione executionis ejusdem judicii super breve nostrum de* SCIRE FACIAS *extra eandem curiam nostram coram nobis emanen. versus ipsum præd.* DONNOGH *in loquela præd. ut dicitur error intervenit manifestus ad grave damnum ipsius* DONNOGH, *sicut ex querela sua accepimus: Nos error si quis fuerit modo debito corrigi et partibus præd. plenam et celerem justitiam fieri volentes in hac parte vobis mandamus quod si judicium in loquela præd. reddit. ac adjudicationem executionis judicii præd. super breve nostrum de* SCIRE FACIAS *præd. adjudicat. tunc record. et process. tam loquel. quam adjudicationis executionis judicii præd. cum omnibus ea tangen. nobis sub sigillo vestro distinctè et apertè mittatis, et hoc breve ita quod ea habeamus in Crastino Ascentionis Domini ubicunque tunc fuerimus in Angl. ut inspect. record. et process. præd. ulterius inde pro errore illo corrigendo* FIERI FACIAS *quod de jure fuerit faciend. et* SCIRE FACIAS *præfat.* ABEL *quod tunc sit ibi ad procedend. in loquela præd. et faciend. ulterius et recipiend. quod dicta Curia consideraverit in præmissis. Teste* MEIPSO *apud Westm. xxii. Januarii anno regni nostri secundo.*

PRICE.

Entry of a writ of error out of IRELAND (*a*).

S. C. Comb. 103.
S. C. Carth. 30.
S. C. Holt, 97.
1. Roll. Abr. 745.
7. Co. 18.
Vaugh. 290.
Cowp. 843.

In adjudicatione executionis super scire facias.

RECORD. *et process. loquelæ unde infra fit mentio cum omnibus ea tangen. coram domino rege ubicunque, &c. ad diem et locum infra content. mitto in quodam record. huic brevi annex. et scire feci* ABEL RAM, *quod tunc sit ibi ad procedend. in loquela præd. prout interius mihi præcipitur.* *Respons.* W. DAVIS.

The return.

* PLACITA *coram domino rege apud* THE KING'S COURTS *de Termino Sanctæ Trinitatis, anno regni domini nostri Caroli Secundi Dei gratia Angliæ, Scotiæ, Franciæ, et Hiberniæ Regis, Fidei defensoris, &c. vicesimo nono. Teste* JOHANNE POVEY, *mil.* SAVAGE, *et* RIVES.

(*a*) See the statute 6. *Geo.* 1. c. 5. and the 22. *Geo.* 3. c. 28. and 22. *Geo.* 3. c. 53. by which all appeals from the courts in Ireland to the courts in England, by writ of error or other proceedings, are declared null and void.

Declaration debt upon bond.

COM. *civitat.* DUBLIN *ss.* MEMORANDUM *quod die Veneris prox. post Crastinum Sanctæ Trinitatis isto eodem Termino coram domino rege apud* THE KING'S COURTS *venit* ABEL RAM, *de civitate* DUBLIN *alderman. per* FAUSTIN. CUPPAIDGE *attornatum suum, et protulit hic in cur. dict. domini regis tunc ibidem quadam billam suam versus* ELIZABETHAM GREY *de civitate* DUBLIN *viduam in custod. maresc. &c. de placito debiti. Et sunt pleg. de prosequend.* JOHANNES DOE *et* RICHARDUS ROE. *Quæ quidem billa sequitur in hæc verba* "*ss.* COM. *civitat.* DUBLIN *ss.* ABEL RAM *de civitate* DUBLIN *aldermannus queritur de* ELIZABETHA GREY *de civitate* DUBLIN *vidua in custodia maresc marescal. domini regis coram ipso rege existen. de placito quod reddat ei octingent. libras bonæ et legalis monetæ Angliæ quas ei debet et injustè detinet pro eo, videlicet, quod cum præd.* ELIZABETHA *vicesimo tertio die Junii anno Domini millesimo sexcentesimo septuagesimo sexto annoq; regni Regis Caroli Secundi vicesimo octavo apud civitat.* DUBLIN *prædict. in parochia Sancti Michaelis Archangeli in warda Sancti Michaelis in comitatu ejusdem civitatis per quoddam scriptum suum obligatorium sigillo ipsius* ELIZABETHÆ *sigillat. curiæq. dicti domini regis nunc hic ostens. cujus dat. est eisdem die et anno cogn. se teneri et firmiter obligari præfat.* ABEL *in præd. octingent. libris sterling. solvend. eidem* ABEL *cum inde requisit. fuisset; prædicta tamen* ELIZABETHA *licet sæpius requisit. prædict. octingent. libras sterling. eidem* ABEL *nondum solvit sed ill. ei hucusque solvere recusavit et adhuc recusat ad damnum ipsius* ABEL *centum libr. sterling. Et inde producit sectam, &c.*"

JUDGMENT by *cognovit actionem.*

ET *prædicta* ELIZABETHA *per* WALTERUM CHAMBERLAIN *attornatum suum venit et defendit vim et injuriam quando, &c. Et dicit quod ipsa non potest dedicere actionem præd.* ABEL *prædict. nec quin scriptum præd. sit factum suum, nec quin ipsa debet præfat.* ABEL *prædict. octingent. libras modo et forma prout præd.* ABEL *superius versus eam queritur.* IDEO CONSIDERATUM EST *quod præd.* ABEL *recuperet versus præfat.* ELIZABETHAM *debitum suum præd. nec non tres libras undecim solid. et sex denar. sterling. pro damnis suis quæ sustin. tam occasione detentionis debiti illius quam pro misis et custagiis suis per ipsum circa sectam suam in hac parte apposit. eidem* ABEL * *per curiam dicti domini regis nunc hic ex assensu suo adjudicata; et præd.* ELIZABETHA *in misericordia, &c.*

* [172]

TISDALE.

PLACITA *coram domino rege apud* THE KING'S COURTS *de Termino Paschæ anno regni domini nostri Jacobi Secundi, Dei gratia Angliæ, Scotiæ, Franciæ, et Hiberniæ, Regis, Fidei defensoris, &c. secundo. Teste* WILLIELMO DAVIS, *mil.* SAVAGE, *et* RIVES.

The *scire facias* against *baron* after the marriage, and death of his wife.

DOMINUS REX *mandavit vic. com. civitat.* DUBLIN *breve suum clausum in hæc verba.* "*ss.* JACOBUS SECUNDUS, *Dei gratia Angliæ, Scotiæ, Franciæ, et Hiberniæ, Rex, Fidei defensor. &c. vic. com. civitat.* DUBLIN *salutem. Cum* ABEL RAM *de civitat.* DUBLIN *aldermannus nuper* SCILICET *Termino Sanctæ Trinitatis, anno regni domini Caroli Secundi, Dei gratia nuper Regis Angliæ, &c. fratris nostri præcharissimi vicesimo nono in cur. ipsius nuper regis coram ipso nuper rege apud* THE KING'S COURTS *per billam sine brevi dicti nuper domini*

mini regis ac per judicium ejusdem Curiæ recuperasset versus ELIZABETHAM GREY *de civitat.* DUBLIN *vidua tam quoddam debitum octingent. libr. bonæ et legalis monetæ Angliæ quam tres libras undecim solid. et sex denar. consimilis monetæ pro damnis suis quæ sustin. tam occasione detentionis debiti illius quam pro misis et custagiis suis per ipsum circa sectam suam in hac parte apposit. unde convict. est sicut nobis constat de recordo; ac post recuperationem judicii præd. præd.* ELIZABETHA *cepit in virum suum quendam* DONATUM OBRIAN *armigerum; ac* POSTEA *scilicet Termino Sanctæ Trinitatis, anno regni dicti domini nuper regis tricesimo primo in curia ipsius domini regis coram ipso nuper rege per considerationem ejusdem curiæ adjudicat. fuisset quod præd.* ABEL RAM *haberet executionem suam versus præfat.* DONATUM OBRIAN *et* ELIZABETHAM *uxorem ejus de debito et damnis præd. juxta vim formam et effectum recuperationis et adjudicationis prædict.; executio tamen tam judicii præd. quam adjudicationis præd. adhuc restat faciend. ac post adjudicationem præd. præd.* ELIZABETHA *obiit et præd.* DONAT. OBRIAN *eam supervixit prout ex insinuatione ipsius* ABEL, *qui post recuperationem et adjudicationem præd. ordin. militis super se suscepit in curia nostra coram nobis accepimus; unde idem* ABEL *nobis supplicavit sibi de remedio congruo in hac parte adhiberi; et nos eidem* ABEL *in hac parte fieri volentes quod est justum,* VOBIS PRÆCIPIMUS *quod per probos et legales homines de balliva vestra scire facias præfat.* DONAT. OBRIAN *quod sit coram nobis apud* THE KING'S COURTS *die Mercurii prox. post Quinden. Paschæ ostens. si quid pro se habeat vel dicere sciat quare præd.* ABEL RAM *executionem suam versus eum de debito et damnis misis et custagiis præd. habere non debeat juxta vim formam et * effectum recuperation. et adjudication. præd. si sibi viderit expedir. et ulterius factur. et receptur. quod Curia nostra coram nobis de eo adtunc et ibidem cons. in hac parte; et habeatis ibi nomina eorum per quos ei scire fac. et hoc breve. Teste* WILLIELMO DAVIS, *milite, apud* THE KING'S COURTS, *duodecimo die Febru- anno regni nostri secundo.*"

OBRIAN *against* RAM.

Ordinem militis suscepit.

* [173]

AD QUEM DIEM *coram dicto domino rege apud* THE KING'S COURTS *ven. præd.* ABEL RAM *in propria persona sua et vic. videlt.* RICHARDUS FRENCH *et* EDWARDUS ROSE *ar. retorn. quod præd.* DONATUS OBRIAN *nihil habet in balliva sua per quod ei scire fac. potuissent nec fuit invent. in eadem; et præd.* DONATUS OBRIAN *non venit; ideo sicut prius præcept. et eisdem vic. quod per probos, &c.* SCIRE FAC. *præfati* DONATO OBRIAN *quod sit coram domino rege apud* THE KING'S COURTS *die Mercurii prox. post quinque Septimanas Paschæ ad ostend. in forma præd. si, &c. ulterius, &c. Idem dies dat. est præfat.* ABEL RAM *ibidem, &c.*

The return of the sheriff.

Alias scire facias awarded.

AD QUEM DIEM *coram dicto domino rege apud* THE KING'S COURTS *ven. præd.* ABEL *per* FAUSTINUM CUPPAIDGE, *attornatum suum, et præfat. vic. ut prius retorn. quod præfat.* DONATUS OBRIAN *nihil habet in balliva sua per quod ei scire facere potuissent nec est invent. in eadem; super quo præd.* DONAT. OBRIAN *per* JOHANNEM MORRIS *attornatum suum ven. et defend. vim et injuriam quando, &c. Et dicit quod præd.* ABEL RAM *executionem suam versus*

The sheriff's return.

The defendant appears and pleads another *scire facias* against him and wife.

OBRIAN against RAM.

versus eum de debito et damnis præd. habere non debet, quia dicit quod præd. ABEL RAM *alias super recuperationem et adjudicationem præd. tulit breve domini Caroli Secundi nuper regis Angliæ, &c. tunc vic. dicti nuper regis com. civit.* DUBLIN *direct. ad præmuniend. ipsum* DONAT. OBRIAN *et dictam* ELIZABETHAM *tunc uxorem ejus ad essend. coram ipso nuper rege apud* THE KING'S COURTS *die Sabbati prox. post Quinden. Sancti Martini tunc dicti nuper regis tricesimo sexto ad ostend. si quid ipsi idem* DONAT. *et* ELIZABETHA *tunc uxor ejus pro se haberent aut dicere scirent quare præd.* ABEL RAM *executionem suam versus eos de debito et damnis præd. non haberet juxta vim et formam recuperationis præd. si sibi vidissent expedir. Et ad diem ill. coram ipso nuper rege apud* THE KING'S COURTS *præd. ven. præd.* ABEL RAM *in propria persona sua, et præd.* DONAT. OBRIAN *et* ELIZABETHA *uxor ejus solemnit. exact. non ven. Et* JOHANNES COYNE *et* SAMUEL WALTON *ar. tunc vic. com. civit. præd. super breve præd. eis per nomen vic. com. civitat.* DUBLIN *direct. retornaver. quod præd.* DONAT. OBRIAN *et* ELIZABETHA *tunc uxor ejus nihil habuer. in balliva sua super quo eis scire fac. potuissent neq; fuer. invent. in eadem balliva. Et ideo sicut alias præcept. fuit eisdem vic. quod per probos et legales homines, &c. scire fac. præfat.* DONAT. OBRIAN *et* ELIZABETHÆ *quod essent* * *coram dicto nuper rege apud* THE KING'S COURTS *præd. die Mercurii prox. post Octab. Sancti Hillarii tunc prox. futur. ad ostend. si quid pro se haberent vel dici scirent quare præd.* ABEL *executionem suam versus eos de debito et damnis præd. non haberet in forma præd. et idem dies dat. fuit præfat.* ABEL RAM *ibidem, &c. Et eadem die ill. coram dicto nuper rege apud* THE KING'S COURTS *præd. venit præd.* ABEL *per præd.* FAUSTINUM CUPPAIDGE *attornatum suum, et præfat. tunc vic. retornaver. super breve de alias scire facias eis in forma præd. direct. quod præd.* DONAT. *et* ELIZABETHA *nihil habuer. in balliva sua per quod eis scire fac. potuissent neq; fuer. invent. in eadem. Et præd.* ABEL RAM *obtulit se quarto die placiti versus præfat.* DONAT. *et* ELIZABETHAM. *Et super hoc iidem* DONAT. *et* ELIZABETHA *per* HENR. DANIEL *tunc eorum attorn. venerunt et dixerunt quod præfat.* ABEL RAM *executionem suam versus eos de debito et damnis præd. habere non debuit, quia dixerunt quod prædict.* ABEL RAM *infra unum annum post recuperationem et adjudicationem præd. prosecut. fuit breve domini tunc regis tunc vic. com. civit. Dublin direct. de fier. fac. de bonis et catallis ipsorum* DONAT. *et* ELIZABETHÆ *debitum et damna præd. et ill. habere coram dicto nuper rege die Mercurii prox. post Quinden. Pasch. prox. post recuperationem et adjudicationem prædict. ad reddend. præfat.* ABEL RAM *pro debito et damnis præd. Et dixerunt quod iidem tunc vic. virtute ejusdem brevis apud civit. Dublin in paroch. Sancti Michaelis in com. ejusdem civitat. levaver. debitum et damna præd. de bonis et catallis ipsorum* DONAT. *et* ELIZABETHÆ, *&c. et ideo petier. judicium si præd.* ABEL *executionem suam de debito et damnis præd. versus eos iterum habere deberet.* ET POSTEA, *scilicet, die Sabbati prox. post Crastin. Ascentionis Domini tunc prox. futur. coram dicto tunc rege apud* THE KING'S COURTS *præd. vener. partes præd. per attorn. suos præd. Et super hoc iidem* DONATUS *et* ELIZABETHA *per*

Retorn. vic.

Alias scire facias.

* [174]

The *baron* and *feme* appear, and plead that execution was levied upon the judgment by a *fieri facias.*

Relicta verificatione placiti.

per HENR. DANIEL *attornatum suum præd. reliquer. verificationem placiti sui præd. et ideo adtunc et ibidem cons. fuit quod præd.* ABEL *haberet executionem suam versus præfat.* DONAT. *et* ELIZABETHAM *de debito et damnis præd. juxta vim formam et effectum recuperationis et adjudicationis prædict. Et super hoc idem* ABEL *obtinuit executionem ill. versus ipsos* DONAT. *et* ELIZABETHAM. *Et præd.* DONAT. *in facto dic. quod præd. debitum et damna præd. de quibus sic adjudicat. fuit quod præd.* ABEL *habueret executionem suam præd. in forma præd. sunt eadem debitum et damna mentionat. in dict. brevibus de scire fac. versus ipsum* DONAT. *nunc latis non alia neque diversa et quod dict. recuperatio eadem quam sic adjudicat. fuit est eadem recuperatio et adjudicatio mentionat. in dict. brevibus de scire fac.* * *versus ipsum* DONAT. *in forma præd. latis et non alia neque diversa; et hoc idem* DONATUS *paratus est verificare; unde ex quo nulla sit mentio considerationis et adjudicationis prædict. in dict. brevibus de scire facias idem* DONATUS OBRIAN *petit judicium si Cur. hic al. executionem super recuperationem et adjudicationem præd. in dict. nunc brevibus de scire facias mentionat. adjudicari debeat, &c.*

OBRIAN *against* RAM.

JUDGMENT thereupon.

* [175]

Et prædictus ABEL RAM *dicit quod præd. placitum præd.* DONAT. OBRIAN *superius placitat. materiaque in eodem content. minus sufficiens in lege existit ad ipsum* ABEL RAM *ab executione sua præd. versus ipsum* DONAT. *habend. præcludend. quodque ipse ad placitum ill. necesse non habet nec per legem terræ tenetur respondere, et hoc paratus est verificare; unde pet. judicium et executionem suam de debito et damnis præd. versus ipsum* DONAT. *sibi adjudicari. Et pro causa moration. in lege super placitum ill. idem* ABEL *ostend. et Cur. hic monstrat causam subsequen. videlicet eo quod dict.* DONAT. *in placito præd. allegat quod præd.* ABEL *per cons. cur. domini regis hic obtinuit executionem versus præfat.* DONAT. *et* ELIZABETHAM *de debito et damnis præd. et non dicit se illud probatur. per record. prout dicere debuit.*

DEMURRER.

Special causes.

Et præd. DONATUS OBRIAN *per attorn. suum præd. dic. quod placitum præd. materiaq; in eodem content. bon. et sufficien. in lege existunt ad ipsum* ABEL *ad executionem suam versus ipsum* DONAT. *habend. præcludi quamquidem materiam præd.* ABEL *non dedicit nec ad eam aliqualit. respond.; et hoc par. est verificare; unde ut prius præd.* DONATUS *petit judicium, et quod præd.* ABEL *ab executione sua præd. versus ipsum* DONAT. *habend. præcludatur, &c. Et quia Cur. domini regis hic de judicio suo de et super præmissis reddend. nondum advisatur, dies inde dat. est partibus præd. coram dicto domino rege apud* THE KING'S COURTS *usque diem Veneris prox. post Crastin. Sanctæ Trinitat. extunc prox. sequen. de judicio suo de et super præmissis audiend. &c. eo quod Cur. dicti domini regis hic inde nondum, &c. Ad quem diem coram dicto domino rege apud* THE KING'S COURTS *ven. partes præd. per attorn. suos præd. Et quia Cur. dicti domini regis de judicio suo de et super præmissis reddend. nondum advisatur, dies inde dat. est partibus præd. coram dicto domino rege apud* THE KING'S COURTS *usque diem Sabbati prox. post Crastin. Animarum extunc prox. sequen. de judicio de et super præmissis audiend. &c. eo quod Cur. domini regis hic inde nondum, &c. Ad quem diem coram dicto domino rege*

Joinder in demurrer.

Continuances.

OBRIAN against RAM.

versus eum de debito et damnis præd. habere non debet, quia dicit quod præd. ABEL RAM *alias super recuperationem et adjudicationem præd. tulit breve domini Caroli Secundi nuper regis Angliæ, &c. tunc vic. dicti nuper regis com. civit.* DUBLIN *direct. ad præmuniend. ipsum* DONAT. OBRIAN *et dictam* ELIZABETHAM *tunc uxorem ejus ad essend. coram ipso nuper rege apud* THE KING'S COURTS *die Sabbati prox. post Quinden. Sancti Martini tunc dicti nuper regis tricesimo sexto ad ostend. si quid ipsi idem* DONAT. *et* ELIZABETHA *tunc uxor ejus pro se haberent aut dicere scirent quare præd.* ABEL RAM *executionem suam versus eos de debito et damnis præd. non haberet juxta vim et formam recuperationis præd. si sibi vidissent expedir. Et ad diem ill. coram ipso nuper rege apud* THE KING'S COURTS *præd. ven. præd.* ABEL RAM *in propria persona sua, et præd.* DONAT. OBRIAN *et* ELIZABETHA *uxor ejus solemnit. exact. non ven. Et*

Retorn. vic.

JOHANNES COYNE *et* SAMUEL WALTON *ar. tunc vic. com. civit. præd. super breve præd. eis per nomen vic. com. civitat.* DUBLIN *direct. retornaver. quod præd.* DONAT. OBRIAN *et* ELIZABETHA *tunc uxor ejus nihil habuer. in balliva sua super quo eis scire fac. potuissent neq; fuer. invent. in eadem balliva. Et ideo sicut alias præcept. fuit eisdem vic. quod per probos et legales homines, &c. scire fac. præfat.* DONAT. OBRIAN *et* ELIZABETHÆ *quod essent* * *coram dicto nuper rege apud* THE KING'S COURTS *præd. die Mercurii prox. post Octab. Sancti Hillarii tunc prox. futur. ad ostend. si quid pro se haberent vel dici scirent quare præd.* ABEL *executionem suam versus eos de debito et damnis præd. non haberet in forma præd. et idem dies dat. fuit præfat.* ABEL RAM *ibidem, &c. Et eadem die ill. coram dicto nuper rege apud* THE KING'S COURTS *præd. venit præd.* ABEL *per præd.* FAUSTINUM CUPPAIDGE *attornatum suum, et præfat. tunc vic. retornaver. super breve de alias scire facias eis in forma præd. direct. quod præd.* DONAT. *et* ELIZABETHA *nihil habuer. in balliva sua per quod eis scire fac. potuissent neq; fuer. invent. in eadem. Et præd.* ABEL RAM *obtulit se quarto die placiti versus præfat.* DONAT. *et* ELIZABETHAM. *Et super hoc iidem* DONAT. *et* ELIZABETHA *per* HENR. DANIEL *tunc eorum attorn. venerunt et dixerunt quod præfat.* ABEL RAM *executionem suam versus eos de debito et damnis præd. habere non debuit, quia dixerunt quod prædict.* ABEL RAM *infra unum annum post recuperationem et adjudicationem præd. prosecut. fuit breve domini tunc regis tunc vic. com. civit. Dublin direct. de fier. fac. de bonis et catallis ipsorum* DONAT. *et* ELIZABETHÆ *debitum et damna præd. et ill. habere coram dicto nuper rege die Mercurii prox. post Quinden. Pasch. prox. post recuperationem et adjudicationem prædict. ad reddend. præfat.* ABEL RAM *pro debito et damnis præd. Et dixerunt quod iidem tunc vic. virtute ejusdem brevis apud civit. Dublin in paroch. Sancti Michaelis in com. ejusdem civitat. levaver. debitum et damna præd. de bonis et catallis ipsorum* DONAT. *et* ELIZABETHÆ, &c. *et ideo petier. judicium si præd.* ABEL *executionem suam de debito et damnis præd. versus eos iterum habere deberet.* ET POSTEA, *scilicet, die Sabbati prox. post Crastin. Ascentionis Domini tunc prox. futur. coram dicto tunc rege apud* THE KING'S COURTS *præd. vener. partes præd. per attorn. suos præd. Et super hoc iidem* DONATUS *et* ELIZABETHA *per*

Alias scire facias.

* [174]

The *baron* and *feme* appear, and plead that execution was levied upon the judgment by a *fieri facias*.

Relicta verificatione placiti.

per Henr. Daniel *attornatum suum præd. reliquer. verificationem placiti sui præd. et ideo adtunc et ibidem cons. fuit quod præd.* Abel *haberet executionem suam versus præfat.* Donat. *et* Elizabetham *de debito et damnis præd. juxta vim formam et effectum recuperationis et adjudicationis prædict. Et super hoc idem* Abel *obtinuit executionem ill. versus ipsos* Donat. *et* Elizabetham. *Et præd.* Donat. *in facto dic. quod præd. debitum et damna præd. de quibus sic adjudicat. fuit quod præd.* Abel *habueret executionem suam præd. in forma præd. sunt eadem debitum et damna mentionat. in dict. brevibus de scire fac. versus ipsum* Donat. *nunc latis non alia neque diversa et quod dict. recuperatio eadem quam sic adjudicat. fuit est eadem recuperatio et adjudicatio mentionat. in dict. brevibus de scire fac.* * *versus ipsum* Donat. *in forma præd. latis et non alia neque diversa; et hoc idem* Donatus *paratus est verificare; unde ex quo nulla fit mentio considerationis et adjudicationis prædict. in dict. brevibus de scire facias idem* Donatus Obrian *petit judicium si Cur. hic al. executionem super recuperationem et adjudicationem præd. in dict. nunc brevibus de scire facias mentionat. adjudicari debeat, &c.*

Obrian against Ram.

J thereupon.

* [175]

Et prædictus Abel Ram *dicit quod præd. placitum præd.* Donat. Obrian *superius placitat. materiaque in eodem content. minus sufficiens in lege existit ad ipsum* Abel Ram *ab executione sua præd. versus ipsum* Donat. *habend. præcludend. quodque ipse ad placitum ill. necesse non habet nec per legem terræ tenetur respondere, et hoc paratus est verificare; unde pet. judicium et executionem suam de debito et damnis præd. versus ipsum* Donat. *sibi adjudicari. Et pro causa moration. in lege super placitum ill. idem* Abel *ostend. et Cur. hic monstrat causam subsequen. videlicet eo quod dict.* Donat. *in placito præd. allegat quod præd.* Abel *per cons. cur. domini regis hic obtinuit executionem versus præfat.* Donat. *et* Elizabetham *de debito et damnis præd. et non dicit se illud probatur. per record. prout dicere debuit.*

Demurrer.

Special causes.

Et præd. Donatus Obrian *per attorn. suum præd. dic. quod placitum præd. materiaq; in eodem content. bon. et sufficien. in lege existunt ad ipsum* Abel *ad executionem suam versus ipsum* Donat. *habend. præcludi quamquidem materiam præd.* Abel *non dedicit nec ad eam aliqualit. respond.; et hoc par. est verificare; unde ut prius præd.* Donatus *petit judicium, et quod præd.* Abel *ab executione sua præd. versus ipsum* Donat. *habend. præcludatur, &c. Et quia Cur. domini regis hic de judicio suo de et super præmissis reddend. nondum advisatur, dies inde dat. est partibus præd. coram dicto domino rege apud* the king's courts *usque diem Veneris prox. post Crastin. Sanctæ Trinitat. extunc prox. sequen. de judicio suo de et super præmissis audiend. &c. eo quod Cur. dicti domini regis hic inde nondum, &c. Ad quem diem coram dicto domino rege apud* the king's courts *ven. partes præd. per attorn. suos præd. Et quia Cur. dicti domini regis de judicio suo de et super præmissis reddend. nondum advisatur, dies inde dat. est partibus præd. coram dicto domino rege apud* the king's courts *usque diem Sabbati prox. post Crastin. Animarum extunc prox. sequen. de judicio de et super præmissis audiend. &c. eo quod Cur. domini regis hic inde nondum, &c. Ad quem diem coram dicto domino rege*

Joinder in demurrer.

Continuances.

OBRIAN *against* RAM.

apud THE KING'S COURTS *ven. partes præd. per attorn. suos præd. Et quia Cur. dicti domini regis hic de * judicio suo de et super præmissis reddend. nondum advisatur, dies inde dat. est partibus præd. coram dicto domino rege apud* THE KING'S COURTS *usque diem Lunæ prox. post Octab. Sancti Hilarii extunc prox. sequen. de judicio suo de et super præmissis audiend. eo quod Cur. dicti domini regis hic inde nondum, &c. Ad quem diem coram dicto domino rege apud* THE KING'S COURTS *vener. partes præd. per attorn. suos præd. super pro visis. Et per Cur. dicti domini regis hic plen. intellectis omnibus et singulis præmiss. maturaque deliberatione inde habita, videtur Cur. dicti domini regis hic quod placitum præd. prædicti* DONAT. *modo et forma præd. placitat. et materia in eodem content. minus sufficien. in lege existunt ad ipsum* ABEL RAM *ab executione sua præd. versus ipsum* DONAT. *habend. præcludend. Ideo cons. est quod præd.* ABEL RAM *habeat executionem suam versus præfat.* DONAT. *de debito et damnis præd. juxta vim formam et effectum recuperationis et adjudicationis præd. &c.*

JUDGMENT *quod habeat executionem.*

ERROR assigned.

ss. POSTEA, *scilicet die Lunæ prox. post tres Septimanas Sancti Michaelis isto eodem Termino coram domino rege apud Westm. ven. præd.* DONAT. OBRIAN *per* JOHANNEM HANCOCK *attorn. suum. Et dic. quod in record. et process. præd. acetiam in adjudicatione execution. judicii præd. manifest. est errat. in hoc, videlt. quod per recordum præd. apparet quod adjudicatio executionis in record. præd. in forma præd. reddit. reddit. fuit pro præfat.* ABEL *versus eundem* DONAT. *ubi per legem Hiberniæ præd. nulla adjudicatio execution. judicii illius reddi debuisset pro præfat.* ABEL *versus eundem* DONAT. *ideo in eo manifest. est errat.* ERRAT. EST ETIAM *in his, quod per record. præd. tunc hic missum diminut. existit in non certificando duo brevia dicti domini Caroli Secundi nuper Regis Angliæ, &c. vic. dicti nuper regis com. civit. Dublin direct. ad præmuniend. præd.* DONAT. OBRIAN *et præd.* ELIZABETHAM *uxor. ejus ad essend. coram ipso nuper rege apud* THE KING'S COURTS *Dublin præd. ad ostend. causam quare præfat.* ABEL *executionem versus eos de debito et damnis præd. non haberet: acetiam in non certificando process. et judic. superinde quia in adjudicatione executionis superinde adjudicatio ill. reddit. fuit pro præfat.* ABEL *versus præd.* DONAT. *et* ELIZABETHAM *uxorem ejus; ubi per legem Hiberniæ nulla adjudicatio execution. judicii præd. reddi debuisset pro præfat.* ABEL *versus ipsos* DONATUM *et* ELIZABETHAM *uxorem ejus: acetiam in non certificando causam vel rationem super recordum allegat. quare brevia præd. emanarent versus præfat.* DONATUM *et* ELIZABETHAM. *Et in his manifest. est erratum. Et pet. idem* DONAT. *breve domini regis prædilecto et fideli consiliario dicti domini regis* THOMAE NUGENT, *arm. Capital Justic. dicti domini regis ad placita in cur. ipsius domini * regis coram ipso rege in regno suo Hiberniæ tenend. assign. dirigend. ad certificand. dicto domino regi nunc plenius inde veritatem. Et ei conceditur, &c. quod quidem breve dictus dominus rex mandavit prædilecto et fideli consiliario suo* THOMÆ NUGENT, *armigero, Capitali Justiciario suo, ad placita in cur. ipsius domini regis coram ipso rege in regno suo Hiberniæ tenend. assign. breve suum clausum in hæc verba." ss.* JACOBUS SECUNDUS, *Dei gratia Angliæ, Scotiæ, Franciæ, et Hiberniæ, Rex, Fidei defensor. &c. Prædilecto et fideli consiliario nostro* THOMÆ NUGENT, *arm. Capital. Justic*

Diminution alledged.

A *certiorari* prayed, *

*[177]

And granted.

The *certiorari* to certify the diminution.

Justic. nostro ad placita in curia nostra coram nobis in regno nostro Hiberniæ tenend. assign. salutem. Volentes de certis causis certiorari de duobus brevibus domini CAROLI SECUNDI *nuper Regis Angliæ, &c. è cur. dicti nuper domini regis coram ipso rege vocat.* THE KING'S COURTS *Dublin. nuper emanem. vic. dicti nuper regis com. civit. Dublin. direct. ad præmuniend.* DONAT. OBRIAN *et* ELIZABETH. *uxor. ejus tunc nuper dict.* ELIZABETHAM GREY *de civitat. Dublin. vid. ad essend. coram ipso nuper rege apud* THE KING'S COURTS *Dublin. præd. ad ostend. causam quare* ABEL RAM *modo mil. sed tempore emanationis præd. brevium de scire fac.* ABEL RAM *de civit. Dublin. alderman. executionem suam versus eos quoddam debito octingent. librarum nec non trium librarum undecim solid. et sex denar. pro damnis per ipsum* ABEL *versus ipsum* ELIZABETHAM *dum sola fuit in eadem cur. recuperat. quæ quidem* ELIZABETHA *post recuperationem judicii præd. versus ipsam nec non ante impetrationem præd. brevium de scire fac. cepit in virum suum præd.* DONAT. OBRIAN: *quod certior. tot. retorn. process. et adjudication. execution. superinde ac pro eo quod record. et process. judicii præd. super quo præd. brevia de scire fac. emanaver. virtute brevis nostri de error. corrigend. cur. nostræ coram nobis apud Westm. miss. et habit. fuer. ac ibidem de record. jam resident. erroribus superinde assign. minimè discussis, vobis mandamus quod præd. duo brevia dict. nuper regis de scire fac. vic. dict. nuper civit. Dublin. direct. una cum retorn. process. et adjudicatione executionis superinde nobis indilate ubicunque, &c. certifices hoc breve nostrum nobis remitten. Teste* ROBERTO WRIGHT, *mil. apud Westm. viii. die Novembris, anno regni tertio.*

HENLY."

OBRIAN against RAM.

BREVE *retorn. process. et adjudication. executionis superinde unde infra fit mentio serenissimo domino regi ubicunque, &c. humillimè mitto et certifico prout interius mihi præcipitur sic respond.* The return.

T. NUGENT.

* BREVE *de scire facias unde in brevi huic schedul. annexat. fit mentio.* * [178]

"CAROLUS SECUNDUS, *Dei gratia Angliæ, Scotiæ, Franciæ, et Hiberniæ, Rex Fidei defensor. &c. vic. com. civit. Dublin salutem. Cum* ABEL RAM *de civit. Dublin aldermannus nuper in cur. nostra coram nobis apud* THE KING'S COURTS *per billam sine brevi nostro ac per judicium ejusdem cur. recuperavit versus* ELIZABETHAM GREY *de civit. Dublin vid. tam quoddam debitum octingent. librarum bonæ et legalis monetæ Angl. quam tres libr. undecim solid. et sex denar. consimilis monetæ quam eidem* ABEL *in eadem cur. nostra coram nobis adjudicat. fuer. pro damnis suis quæ sustin. tam occasione detention. debiti illius quam pro misis et custagiis suis per ipsum circa sectam suam in hac parte apposit. unde convict. est sicut nobis constat de recordo; executio tamen judicii præd. adhuc restat faciend. ac præd.* ELIZABETHA *post judicium præd. redditum cepit in virum suum quendam* DONAT. OBRIAN *armiger. prout ex insinuatione ipsius* ABEL *accepimus; unde nobis supplicavit idem* ABEL *sibi de remedio suo congruo in hac parte adhiberi; et nos eidem* ABEL *fieri volentes quod est justum, vobis præcipimus quod per probos et legales homines de balliva vestra scire fac. præfat.* DONAT. *et* ELIZABETHÆ *quod sint coram nobis apud* THE KING'S COURTS

The first *scire facias* against baron and *feme* to revive the judgment, and make both liable.

OBRIAN *against* RAM.

COURTS *die Mercurii prox. post quinque Septimanas Paschæ prox. futur. ad ostend. si quid pro se habeant vel dicere sciant quare præd.* ABEL *executionem suam versus eos de debito et damnis præd. habere non debet juxta vim formam et effectum recuperationis præd. si sibi viderit expedire et ulterius ad faciend. et recipiend. quod Cur. nostra coram nobis de eo adtunc et ibidem consid. in hac parte; et habeat ibi nomina eorum per quos eis scire fac. et hoc breve. Teste* ROBERTO BOOTH, *mil. apud* THE KING'S COURTS, *septimo die Maii, anno regni nostri tricesimo primo.* CUPPAIDGE, SAVAGE, *et* RIVES."

The return. *Infra nominat.* DONAT. *et* ELIZABETHA *nihil habent aut eorum alter habet in balliva nostra per quod eis aut eorum alteri scire fac. possumus neq; sunt nec eorum alter est invent. in eadem. Sic respond.* WILLIELMUS COOKE *et* THOMAS TENNANT, *armiger. vic.*

The *alias scire facias.* "CAROLUS SECUNDUS, *Dei gratia Angliæ, Scotiæ, Franciæ, et Hiberniæ, Rex, Fidei defensor, &c. vic. com. civit. Dublin salutem. Cum* ABEL RAM *de civit. Dublin aldermannus nuper in curia nostra coram nobis apud* THE KING'S COURTS *per billam sine brevi nostro ac per judicium ejusdem cur. recuperavit versus* ELIZABETHAM

*[179] GREY *de civitat. Dublin vid. tam quoddam debitum octingentarum librarum bonæ et legalis monetæ Angliæ quam tres libras undecim solid. et sex denar. consimilis monetæ qui eidem* ABEL *in eadem curia nostra coram nobis adjudicat. fuer. pro damnis suis quæ sustinuit tam occasione detentionis debiti illius quam pro misis et custagiis suis per ipsum circa sectam suam in hac parte apposit. unde convict. est sicut nobis constat de recordo, executio tamen judicii præd. adhuc restat faciend. ac præd.* ELIZABETHA *post judicium præd. redditum cepit in virum suum quendam* DONAT. OBRIAN, *armiger. prout ex insinuatione ipsius* ABEL *accepimus, unde nobis supplicavit idem* ABEL *sibi de remed. suo congruo in hac parte adhiberi, et nos eidem* ABEL *fieri volentes quod est justum, vobis præcipimus sicut alias vobis præcepimus quod per probos et legales homines de balliva vestra scire faciatis præd.* DONAT. *et* ELIZABETHÆ *quod sint coram nobis apud* THE KING'S COURTS *de Veneris prox. post Crastinum Sanctæ Trinitatis proxime futur. ad ostend. si quid pro se habeant vel dicere sciant quare præd.* ABEL *executionem suam versus eos de debito et damnis præd. habere non debet juxta vim formam et effectum recuperationis præd. si sibi viderit expedire, et ulterius faciend. et recipiend. quod Cur. nostra coram nobis de eo adtunc et ibidem consid. in hac parte; et habeatis ibi nomina eorum per quos eis scire faciatis et hoc breve. Teste* ROBERTO BOOTH, *mil. apud* THE KING'S COURTS, *vicesimo primo die Maii, anno regni nostri tricesimo primo.*

CUPPAIDGE, SAVAGE, *et* RIVES."

The return. *Infra nominat.* DONAT. *et* ELIZABETHA *nihil habent aut eorum alter habet in balliva nostra per quod eis aut eorum alteri scire facias possimus, neque sunt nec eorum alter est invent. in eadem. Sic respond.* WILLIELMUS COOKE *et* THOMAS TENNANT, *armiger. vic.*

Record. adjudication. executionis super præd. breve de scire facias.

THE PLACITA. PLACITA *coram domino rege apud* THE KING'S COURTS *de Termino Sanctæ Trinitatis anno regni domini nostri Caroli Secundi, Dei gratia*

gratia Angliæ, Scotiæ, Franciæ, et Hiberniæ, Regis, Fidei defensoris, &c. tricesimo primo. Teste ROBERTO BOOTH, *Milite.* OBRIAN against RAM.

SAVAGE, *et* RIVES.

DOMINUS REX *mandavit vic. com. civit. Dublin breve suum clausum in hæc verba.* " *ss.* CAROLUS SECUNDUS, *Dei gratia Angliæ, Scotiæ, Franciæ, et Hiberniæ, Rex, Fidei defensor. &c. vic. com. civit. Dublin salutem. Cum* ABEL RAM *de civit. Dublin aldermannus nuper in curia nostra coram nobis apud* THE KING'S COURTS *per billam sine brevi nostro ac per judicium ejusdem cur. recuperavit versus* ELIZABETHAM GREY *de civit. Dublin vid. tam * quoddam debitum octingentarum librarum bonæ et legalis monetæ Angl. quam tres libr. undecim solid. et sex denar. consimilis monet. qui eidem* ABEL *in eadem curia nostra coram nobis adjudicat. fuer. pro damnis suis quæ sustin. tam occasione detentionis debiti illius quam pro misis et custagiis suis per ipsum circa sectam suam in ea parte apposit. unde convict. est sicut nobis constat de recordo; executio tamen judicii præd. adhuc restat faciend. ac præd.* ELIZABETHA *post judicium præd. redditum cepit in virum suum quendam* DONAT. OBRIAN, *armiger. prout ex insinuatione ipsius* ABEL *accepimus; unde nobis supplicavit idem* ABEL *sibi de remedio suo congruo in hac parte adhiberi; et nos eidem* ABEL *fieri volentes quod est justum, vobis præcipimus quod per probos et legales homines de balliva vestra scire fac. præfat.* DONAT. *et* ELIZABETHÆ *quod sint coram nobis apud* THE KING'S COURTS *die Mercurii prox. post quinque Septimanas Paschæ prox. futur. ad ostend. si quid pro se habeant vel dicere sciant quare præd.* ABEL *executionem suam versus eos de debito et damnis præd. habere non debet juxta vim formam et effectum recuperationis præd. si sibi viderit expediri; et ulterius factur. et receptur. quod Cur. nostra coram nobis de eo adtunc et ibidem cons. in hac parte; et habeatis ibi nomina eorum per quos eis scire fec. et hoc breve. Teste* ROBERTO BOOTH, *mil. apud* THE KING'S COURTS, *septimo die Maii, anno regni nostri tricesimo primo.*"

The entry of the *scire facias* upon THE ROLL.

* [180]

Ad quem diem coram domino rege apud THE KING'S COURTS *ven. præd.* ABEL *in propria persona sua et vic. videlicet* WILLIELMUS COOKE *et* THOMAS TENNANT, *armiger. retorn. quod præd.* DONAT. *et* ELIZABETHA *nihil habent in balliva sua per quod eis scire fac. potuissent nec fuer. invent. in eadem; et præd.* DONAT. *et* ELIZABETHA *non ven. Ideo sicut alias præcept. fuit eisdem vic. quod per probos, &c. scire facias præfat.* DONAT. *et* ELIZABETHÆ *quod sint coram domino rege apud* THE KING'S COURTS *die Veneris prox. post Crastin. Sanctæ Trinitatis ad ostend. in forma præd. &c. si, &c. et ulterius, &c. Idem dies dat. est præfat.* ABEL *ibidem, &c.*

Return.

Alias scire facias awarded.

Ad quem diem coram domino rege apud THE KING'S COURTS *ven. præfat.* ABEL *per* FAUSTINUM CUPPAIDGE, *attornatum suum; et præfat. vic. ut prius retorn. quod præd.* DONAT. *et* ELIZABETHA *nihil habent in balliva sua per quod eis scire fac. potuissent nec sunt invent. in eadem, et præd.* DONAT. *et* ELIZABETHA *non vener. sed defalt. fec. Ideo cons. est quod præd.* ABEL *habeat executionem suam versus præfat.* DONAT. *et* ELIZABETHAM *de debito et damnis præd. juxta vim formam et effectum recuperationis præd. &c.*

Return.

JUDGMENT *quod habeat executionem* against *baron* and *feme*.

Alias

OBRIAN against RAM.

Alias breve de scire facias inter ABEL RAM *quer. et* DONAT. OBRIAN *et* ELIZABETHAM, *uxor. ejus, defend.*

[181] * CAROLUS SECUNDUS, *Dei gratia Angliæ, Scotiæ, Franciæ, et Hiberniæ, Rex, Fidei defensor. &c. vic. com. civitatis Dublin salutem. Cum* ABEL RAM *de civitat. Dublin aldermannus nuper in curia nostra coram nobis apud* THE KING'S COURTS *per billam suam sine brevi nostro ac per judicium ejusdem Curiæ recuperavit versus* DONATUM OBRIAN, *armigerum, et* ELIZABETHAM OBRIAN, *alias* GREY, *uxorem ejus, tam quoddam debitum octingent. librarum sterling. quam tres libras undecim solid. et sex denar. consimilis monetæ quæ eidem* ABEL *in eadem curia nostra coram nobis adjudicat. fuer. pro damnis quæ sustin. tam occasione detentionis debiti illius quam pro misis et custagiis suis per ipsum circa sectam suam in hac parte apposit. unde convict. sunt sicut nobis constat de recordo; executio tamen judicii præd. adhuc restat faciend. prout ex insinuatione ipsius* ABEL *accepimus; unde nobis supplicavit idem* ABEL *sibi de remedio suo congruo in hac parte adhiberi; et nos volentes eidem* ABEL *fieri quod est justum, vobis præcipimus quod per probos et legales homines de balliva vestra scire fac. præfat.* DONAT. OBRIAN *et* ELIZABETHÆ, *uxor. ejus, quod sint coram nobis apud* THE KING'S COURTS *die Sabbati prox. post quinden. Sancti Martini prox. futur. ad ostend. si quid pro se habeant vel dicere sciant quare præd.* ABEL *executionem suam versus eos de debito et damnis præd. habere non debet juxta vim formam et effectum recuperationis præd. si sibi viderit expediri; et ulterius factur. et recептur. quod Curia nostra coram nobis de eo adtunc et ibidem consideraverit in hac parte; et habeatis ibi tunc nomina eorum per quos eis scire facias, et hoc breve. Teste* ROBERTO BOOTH, *mil. apud* THE KING'S COURTS, *sexto die Novembris, anno regni nostri tricesimo secundo.* CUPPAIDGE, SAVAGE, *et* RIVES.

Scire facias against baron upon the judgment upon the scire facias against them to make them both alike.

Return.

Infra nominat. DONAT. *et* ELIZABETHA *nihil habent aut eorum alter habet in balliva nostra per quod eis aut eorum alteri scire fac. possimus, neq; sunt nec eorum alter est invent. in eadem. Sic respond.* JOHANNES COYNE *et* SAMUEL WALTON, *armig. vic.*

Alias scire facias.

CAROLUS SECUNDUS, *Dei gratia Angliæ, Scotiæ, Franciæ, et Hiberniæ, Rex, Fidei defensor. &c. vic. com. civitatis Dublin salutem. Cum* ABEL RAM *de civitate Dublin aldermannus nuper in curia nostra coram nobis apud* THE KING'S COURTS *per billam sine brevi nostro et per judicium ejusdem Curiæ recuperavit versus* DONATUM OBRIAN, *armigerum, et* ELIZABETHAM OBRIAN, *alias* GREY, *uxorem ejus, tam quoddam debitum octingent. libr. sterling. quam tres libras undecim solid. et sex denar. consimilis monetæ quæ eidem* ABEL *in eadem curia nostra coram nobis adjudicat. fuer. pro damnis suis quæ sustin. tam occasione detentionis debiti illius quam pro* [182] * *misis et custagiis suis per ipsum circa sectam suam in hac parte apposit. unde convict. sunt sicut nobis constat de recordo; executio tamen judicii præd. adhuc restat faciend. prout ex insinuatione ipsius* ABEL *accepimus; unde nobis supplicavit idem* ABEL *sibi de remedio suo congruo in hac parte adhiberi; et nos volentes eidem* ABEL *fieri quod est justum, vobis præcipimus sicut alias vobis præceperimus quod per probos*

bos et legales homines de balliva vestra scire fac. præfat. DONAT. OBRIAN *et* ELIZABETHÆ, *uxor. ejus, quod sint coram nobis apud* THE KING'S COURTS *die Mercurii prox. post Octab. Sancti Hillarii prox. futur. ad ostend. si quid pro se habeant vel dicere sciant quare præd.* ABEL *executionem suam versus eos de debito et damnis præd. habere non debet juxta vim formam et effectum recuperationis præd. si sibi viderit expediri; et ulterius factur. et receptur. quod Curia nostra coram nobis de eo adtunc et ibidem cons. in hac parte; et habeas ibi tunc nomina eorum per quos eis scire fec. et hoc breve. Teste* ROBERTO BOOTH, *mil. apud* THE KING'S COURTS, *vicesimo octavo die Novembris, anno regni nostri tricesimo secundo.* OBRIAN *against* RAM.

CUPPAIDGE, SAVAGE, *et* RIVES.

Infra nominat. DONAT. *et* ELIZABETHA *nihil habent aut eorum alter habet in balliva nostra per quod eis aut eorum alteri scire fac. possumus, neq; sunt nec eorum alter est invent. in eadem. Sic respond.* JOHANNES COYNE *et* SAMUEL WALTON, *armiger. vic.* Return.

Record. adjudication. execution. super præd. breve de scire facias ult. mentionat.

PLACITA *coram domino rege apud* THE KING'S COURTS *de Termino Paschæ anno regni Domini Caroli Secundi, Dei gratia Angliæ, Scotiæ, Franciæ, et Hiberniæ, Regis, Fidei defensoris, &c. tricesimo tertio. Test.* WILLIELMO DAVIS, *mil.* THE PLACITA.

SAVAGE, *et* RIVES.

DOMINUS REX *mandavit vic. com. civitat. Dublin breve suum clausum in hæc verba. "ss. Carolus Secundus, Dei gratia Angliæ, Scotiæ, Franciæ, et Hiberniæ, Rex, Fidei defensor. &c. vic. com. civitat. Dublin salutem. Cum* ABEL RAM *de civitate Dublin aldermannus nuper in curia nostra coram nobis apud* THE KING'S COURTS *per billam sine brevi nostro ac per judicium ejusdem Curiæ recuperavit versus* DONATUM OBRIAN, *armigerum, et* ELIZABETHAM OBRIAN, *alias* GREY, *uxorem ejus, tam quoddam debitum octingent. librarum sterling. quam tres libr. undecim solid. et sex denar. consimilis monetæ qui eidem* ABEL *in eadem curia nostra coram nobis adjudicat. fuer. pro damnis suis quæ sustin. tam occasione detentionis debiti illius quam pro misis et custagiis suis per ipsum circa sectam suam in hac parte apposit. unde convict. sunt sicut nobis constat de recordo; executio tamen* * *judicii præd. adhuc restat faciend. prout ex insinuatione ipsius* ABEL *accepimus; unde nobis supplicavit idem* ABEL *sibi de remed. suo congruo in hac parte adhiberi; et nos volentes eidem* ABEL *fieri quod est justum, vobis præcipimus quod per probos et legales homines balliva vestra scire fac. præfat.* DONAT. OBRIAN *et* ELIZABETHÆ *uxori ejus quod sint coram nobis apud* THE KING'S COURTS *die Sabbati prox. post Quinden. Sancti Martini prox. futur. ad ostend. si quid pro se habeant vel dicere sciant quare præd.* ABEL *executionem suam versus eos de debito et damnis præd. habere non debet juxta formam et effectum recuperationis præd. si sibi viderit expediri; et ulterius factur. et receptur. quod Curia nostra coram nobis adtunc et ibidem de eo cons. in hac parte; et habeatis ibi tunc nomina eorum per quos* The entry of the *sci. fa.* * [183]

eis

OBRIAN against RAM.

eis scire fec. et hoc breve. Teste ROBERTO BOOTH, *mil. apud* THE KING'S COURTS, *sexto die Novembris, anno regni nostri tricesimo secundo.*

Return.

Ad quem diem coram domino rege apud THE KING'S COURTS *ven. præd.* ABEL *in propria persona sua et vic. videlicet* JOHANNES COYNE *et* SAMUEL WALTON, *armigeri, retorn. quod præd.* DONAT. OBRIAN *et* ELIZABETHA, *uxor ejus, nihil habuer. in balliva sua per quod eis scire fac. potuissent, neq; fuer. invent. in eadem; et præd.* DONAT. *et* ELIZABETHA *non ven. Ideo sicut alias præcept. fuit eisdem vic. quod per probos &c. scire fac. præfat.* DONAT. *et* ELIZABETHÆ *quod essent coram domino rege apud* THE KING'S COURTS *die Mercurii prox. post Octab. Sancti Hilarii ad ostend. in forma præd. si, &c. et ulterius, &c. Idem dies datus est præfat.* ABEL *ibidem, &c.*

Alias scire facias awarded.

Ad quem diem coram dicto domino rege apud THE KING'S COURTS *ven. præd.* ABEL *per præd.* FAUSTINUM CUPPAIGE, *attornatum suum; et præfat. vic. ut prius retorn. quod præd.* DONAT. *et* ELIZABETHA *nihil habuer. in balliva sua per quod eis scire fac. potuissent, neq. fuer. invent. in eadem. Et præd.* ABEL *obtulit se quarto die placiti versus præfat.* DONATUM *et* ELIZABETHAM. *Et super hoc idem* DONAT. *et* ELIZABETHA *per* HENRICUM DANIEL, *attornatum suum, ven. et dicunt quod præfat.* ABEL *executionem versus eos de debito et damnis præd. habere non debet, quia dic. quod præd.* ABEL *infra unum annum post recuperationem præd. prosecut. fuit breve domini modo regis adtunc vic. com. civitatis Dublin. direct. de fieri fac. de bonis et catallis præfat.* DONATI *et* ELIZABETHÆ *debit. et damn. præd. et quod ill. haberent hic in curia die Mercurii prox. post Quinden. Paschæ prox. post recuperationem debiti et damn. præd. ad reddend. præfat.* ABEL RAM *pro debito et damnis præd.; et dicunt quod iidem vic. virtute ejusdem brevis apud civitatem Dublin. in parochia Sancti Michaelis Archangeli in warda Sancti Michaelis in com. ejusdem civitatis fecer. et levaver. debitum et damna præd. de bonis et catallis ipsorum*
* [184] DONAT. *et* ELIZABETHÆ; *et hoc parati sunt* * *verificare; unde petunt judicium si prædictus* ABEL *executionem suam de debito et damnis prædict. versus eos iterum habere debeat, &c.*

The defendants appear, and plead that the money due upon the judgment was levied upon a *fieri facias.*

Relicta verificationis.

Postea, scilicet die Sabbati prox. post Crastin. Ascentionis Domini isto eodem Termino coram dicto domino rege apud THE KING'S COURTS *ven. partes præd. per attornatos suos præd. Et super hoc iidem* DONATUS *et* ELIZABETHA *per attornatum suum præd. relict. per eos prior. verification. per ipsos in forma præd. superius placitat. dicunt quod ipsi non possunt dedicere quin præd.* ABEL *executionem suam versus eos de debito et damnis misis et custagiis præd. virtute recuperationis præd. habere debeat.* IDEO CONSIDERATUM EST *quod præd.* ABEL *habeat executionem suam versus præfat.* DONATUM *et* ELIZABETHAM *de debito misis et custagiis præd. juxta vim formam et effectum recuperationis præd. &c.* SUPER QUO *præd.* DONAT. *ut prius dic. quod in record. et process. præd. necnon in adjudicatione recuperation. præd. manifeste est erratum allegando*

JUDGMENT thereupon.

legando errores præd. per ipsum superius allegat. ac petit quod judicium præd. ob errores ill. et al. in record. et processf. præd. existen. revocetur adnulletur et penitus pro nullo habeatur; ac quod idem DONAT. *ad omnia quæ ipse occasione judicii præd. amisit restituatur quodq. præd.* ABEL *ad errores præd. rejungeret.*

OBRIAN against RAM.

The plaintiff counts upon his errors.

Et superinde præd. ABEL *dicit quod nec in record. et processf. præd. nec in redditione judicii præd. nec in adjudicatione executionis super judic. illud in ullo est erratum; et pet. similiter quod Curia dicti domini regis nunc hic procedat tam ad examinationem tam record. et processf. præd. quam materias præd. superius pro errore assignat. et quod judic. præd. in omnibus affirmetur. Sed quia Curia dicti domini regis nunc hic de judicio suo de et super præmissis reddend. nondum advisatur, dies inde dat. est partibus præd. coram domino rege usque in Octab. Sancti Hillarii ubicunque, &c. de judicio suo de et super præmissis audiend. eo quod Curia dicti domini regis nunc hic inde nondum, &c. Ad quem diem coram domino rege apud Westm. ven. partes præd. per attornatos suos præd. Sed quia Curia dict. domini regis nunc hic de judicio de et super præmissis reddend. nondum advisatur, dies inde dat. est partibus præd. coram domino rege usque à die Paschæ in quindecim dies ubicunque, &c. de judicio suo inde audiend. eo quod Curia dicti domini nunc hic inde nondum, &c. Ad quem diem coram domino rege apud Westm. ven. partes præd. per attornatos suos præd. Sed quia Curia dicti domini regis nunc hic de judicio suo de et super præmissis reddend. nondum advisatur, dies inde dat. est partibus præd. coram domino rege usque in Crastino Sanctæ Trinitatis ubicunq. &c. de judicio suo inde audiend. eo quod Curia dicti domini regis nunc hic inde nondum, &c. Ad quem diem coram domino rege apud* * *Westm. ven. partes præd. per attornatos suos præd. Sed quia Curia dicti domini regis nunc hic de judicio suo de et super præmissis reddend. nondum advisatur, dies inde dat. est partibus præd. coram domino rege usque à die Sancti Michaelis in tres Septimanas ubicunque, &c. de judicio suo inde audiend. eo quod Curia dicti domini regis nunc hic inde nondum, &c. Ad quem diem coram domino rege apud Westm. ven. partes præd. per attorn. suos præd. Sed quia Curia dicti domini regis nunc hic de judicio suo de et super præmissf. reddend. nondum advisatur, dies inde dat. est partibus præd. coram domino rege usq. in Octab. Sancti Hillarii ubicunq. &c. de judicio suo inde audiend. eo quod Curia dicti domini regis nunc hic inde nondum, &c.* POSTEA, *scilicet à die Paschæ in quindecim dies extunc prox. sequen. usque quem diem record. et processf. prædict. antea remanen. sine die virtute cujusdam act. parliamenti confect. apud Westm. decimo tertio die Februarii anno regni domini* WILLIELMI *et dominæ* MARIÆ *nunc regis et reginæ Angliæ, &c. primo revivificat. continuat. et adjournat. fuit coram dicto domino rege et dicta domina regina* WILLIELMO *et* MARIA *apud Westm. ven. partes præd. per attornatos suos præd. Sed quia Curia dict. domini regis et dominæ reginæ nunc hic de judicio suo de et super præmissf. reddend. nondum advisatur, dies inde dat. est partibus præd. coram domino rege et domina regina usq. à die Paschæ in tres Septimanas ubicunq. &c. de judicio suo inde audiend. eo quod Curia dict.*

The defendant in the error pleads *in nullo est erratum*.

Continuance.

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The process discontinued, revived by act of parliament, Will. & Mar.

Continuance.

OBRIAN *against* RAM.

dict. domini regis et dominæ reginæ nunc hic inde nondum, &c. Ad quem diem coram domino rege et domina regina apud Westm. vener. partes præd. per attornatos suos præd. super quo visis. Et per Cur. dicti domini regis et dominæ reginæ nunc hic plenius intellect. omnibus et singulis præmiss. diligenterque examinat. et inspect. tam record. et process. præd. ac judic. et adjudication. executionis super eisdem reddit. quam præd. causas et materias per præd. DONATUM OBRIAN *superius pro error. assign. videtur Curiæ domini regis et dominæ reginæ nunc hic, quod nec in record. et process. prædict. nec in redditione judicii prædict. et adjudicatione executionis superinde in ullo est errat. ac quod record. ill. in nullo vitiosum aut defectivum existit.* IDEO CONSIDERATUM EST *quod judicium præd. et adjudication. executionis superinde in omnibus affirmetur ac in omni suo robore stet et effectu dict. causis et materiis superius pro error assign. in aliquo non obstante. Et ulterius per Cur. domini regis et dominæ reginæ nunc hic cons. est quod prædict.* ABEL RAM *recuperet versus præfatum* DONATUM OBRIAN *octodecim libras eidem* ABEL *per Curiam domini regis et dominæ reginæ nunc hic secundum formam statuti in hujusmodi casu edit. et provis. adjudicat. pro misis custagiis* [186] *et damn. suis quæ sustin. occasione * dilationis executionis judicii prædict. prætextu prosecutionis prædict. brevis de errore; et quod prædictus* ABEL *habeat inde executionem, &c.*

JUDGMENT affirmed.

Case 114.

Obrian *against* Ram.

Michaelmas Term, 3. Jac. 2. Roll 192.

If judgment be obtained against a *feme sole*, and, on her subsequent *coverture*, the plaintiff obtains judgment on a *scire facias* against the *husband and wife*, and after a year and a day the wife dies, the plaintiff may bring a new *scire facias quare executionem non* against the husband alone; for he cannot plead the former judgment on the first *scire facias* in bar.—S. C. Comb. 152. S. C. Carth. 30. S. C. Holt, 97. Co. Lit. 351. 1. Mod. 179. 1. Sid. 837. Skin. 682. Salk. 116. Lutw. 671. 2. Ld. Ray. 1050. 1. Vern. 396. 2. Vern. 118. 249. 1. Ch. 63. 118. 225. 328. 502. 8. Mod. 200. 9. Mod. 169. 10. Mod. 161. 246. 12. Mod. 6. 383. Gilb. E. R. 72. 145. Fitzg. 149. 205. Comyns, 31. 725. Cases T. T. 168. 171. Stra. 229. 576. 2. Stra. 726. 1094. 1272. 1. Com. Dig. 577. 1. Bl. Com. 443. Bac. Abr. 289. 292, 293. 1. Ch. Cas. 295. 2. Bac. Abr. 361. 2. Ld. Raym. 1050. Wp. 201. Dougl. 637.

ERROR to reverse a judgment, given in *Ireland*, upon a *scire facias* brought against the plaintiff in the errors; setting forth, that debt was brought upon a bond against *Elizabeth Grey*, and a judgment thereupon obtained for eight hundred pounds *dum sola*; that the said *Elizabeth* afterwards intermarried with *Mr. Obrian*; that a *scire facias* was brought upon that judgment against husband and wife, to shew cause why the plaintiff should not have execution; that upon this *scire facias* there were two *nihils* returned, and thereupon judgment was had against husband and wife; that it rested for a year and a day, and then the wife died, and the plaintiff brought a new *scire facias* against the husband alone, to shew cause why he should not have execution upon the first judgment. The defendant pleaded, that there was another *scire facias* brought against him and his wife for the same cause, &c.; and, upon a demurrer to this plea, judgment was given in *Ireland* against him.

The

The queſtion now was, Whether this *ſcire facias* will lie againſt the huſband alone, after the death of his wife? — OBRIAN *againſt* RAM.

MR. FINCH and MR. POLLEXFEN argued that the huſband was not chargeable. It was admitted on all ſides, that if *a feme ſole* be indebted and marry, an action will lie againſt the huſband and wife, for he is liable to the payment of her debts. It was agreed alſo, that if a judgment be had againſt a *feme ſole*, and ſhe marry, and afterwards die, the huſband is not chargeable, becauſe her debts before coverture ſhall not charge him, unleſs recovered in her life-time. In like manner no debts which are due to her *dum ſola*, ſhall go to the huſband by virtue of the intermarriage, if ſhe die before thoſe are recovered; but her adminiſtrator will be entitled to them, which may be the huſband, but then he has a right only as adminiſtrator; and the reaſon is, becauſe ſuch debts, before they are recovered, are only *choſes in action (a)*. And from hence the counſel inferred, that the judgment in this caſe againſt the wife *dum ſola* did not charge the huſband.

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* Then the queſtion will be, if the huſband is not chargeable by the original judgment, Whether the judgment on the *ſcire facias* has not made an alteration, and charged him after the death of his wife? And as to that it was ſaid, that this judgment upon the *ſcire facias* made no new charge, for it is only *quòd habeat executionem, &c.* and carries the firſt judgment no farther than it was before, for it is introduced by the *ſcire facias*. At the common law no execution could be had upon a judgment after a year and a day; and there was then no remedy but to bring an action of debt upon that judgment. This inconvenience was remedied by the ſtatute of *Weſtminſter the Second (b)*, which gives a *ſcire facias* upon the judgment, to ſhew cauſe why execution ſhould not be had; which can be no more than a liberty to take execution upon the original judgment, which cannot charge the huſband in this caſe, becauſe it is only a conſequence of that judgment, and creates no new charge, for a releaſe of all actions will diſcharge this award of execution. But the reaſons why the original judgment ſhall not be carried farther by the judgment in the *ſcire facias* are as follow.

Ld. Ray. 768. 808. 1048. 1253. 8. Mod. 73. 366. 10. Mod. 112. 258. 270. 354. 12. Mod. 231. 377. 407. 499.

FIRST, By conſidering the nature of a *ſcire facias*, which lay not at the common law, but is given by the ſtatute in all perſonal actions; the words whereof are theſe, "*obſervandum eſt de cætero* "*quòd ea quæ inveniuntur irrotulat. &c. (c)*." Upon which words it is evident, that the execution of the firſt judgment on record is all that is given by this act after the year and day, and it takes off that bar which was incurred by the lapſe of time, and gives a ſpeedy execution of the judgment recorded.

1. Barnes, 309. 3. Peer. Wms. 148.

SECONDLY, The proceedings upon a *ſcire facias* ſhew the ſame thing, for the writ recites the firſt judgment, and then de-

(a) 1. Roll. Abr. 351. 2. Bl. Com. 435.
(b) 13. Edw. 1. ſt. 1. c. 45.
(c) 2. Inſt. 469. 1. Sid. 351.

mands

OBRIAN *against* RAM.

mands the defendant to shew cause why the plaintiff should not have execution thereon *juxta vim formam et effectum recuperationis præd.* but prays no new thing.

THIRDLY, A *scire facias* is not an *original* but a *judicial writ*, which depends purely upon the first judgment, and a writ of error suspends the execution of both, so likewise, if theoriginal judgment be reversed, even a judgment obtained upon a *scire facias*, will be reversed in like manner (*a*).

FOURTHLY, The law does not charge a man without an appearance; but here is none: and the statute can never operate upon this case, because it extends only to such judgments upon which
* [188] there has been a recovery; and here is nothing * recovered upon this *scire facias*, for it is only to have execution upon the first judgment. If the law should be otherwise, this absurdity would follow, *viz.* there would be a recovery without a record; for the purport of the *scire facias* is only to have execution according to the form and effect of the record, and the very record itself doth not charge the husband. Besides, the first judgment did charge the lands of the wife, which are still liable to satisfy the debt; why therefore must the lands of the husband be charged? Cannot the administrator of the wife bring a writ of error to reverse this judgment? And if it should be reversed, Shall the husband pay the debt, and the administrator of the wife be restored? The objections made by the counsel on the other side against this opinion were, That if an action of debt will lie upon a judgment in a *scire facias*, the original judgment is by this means carried farther, for without a new recovery debt will not lie; and to prove this there is an authority in *Fitzherbert* (*b*), where A PRIOR had judgment for an annuity, and brought a *scire facias* upon that judgment against the successor of the parson who was to pay it, and obtained a judgment upon that *scire facias* to recover the arrearages, and afterwards brought an action of debt upon the last judgment, and the Book says, "*fuit maintien*". There is another case in *Leonard* (*c*), where it is held, that an action of debt will lie upon a judgment in a *scire facias* upon a recognizance. Which objections may receive this answer. FIRST, As to the case in *Fitzherbert*, it is admitted to be law, but it is not an authority to be objected to this purpose, because the first judgment for the annuity charges the successor; but the original judgment in this case doth not charge the husband; so the cases are not parallel. The like answer may be given to the case in *Leonard*, for a recognizance is a judgment in itself (*d*), and debt will lie upon it without a *scire facias* upon that judgment.

But *on the other side* it was argued, that the award of execution is absolute against husband and wife; for it is a recovery against both; whereas before it was only the debt of the wife, but now it

(*a*) 1. Roll. Abr. 777. pl. 6.; and Dr. Drurie's Case, 8. Co. 143.
(*b*) Fitz. Nat. Brev. 122.
(*c*) 2. Leon. 14. 4. Leon. 185. 15. *Hen.* 7. pl. 16.
(*d*) See 2. Com. Dig. 634. fo. edit.

is joint againſt the one as well as the other *(a)*. * The judgment upon the *ſcire facias* is a diſtinct action. It cannot be denied, but that if a woman be indebted and marry, the huſband is chargeable during the coverture, which ſhews that by the marriage he is become the principal creditor *(b)*. As to the *ſcire facias*, it is true, that at the common law, if a man recovered in debt, and did not ſue forth execution within a year and a day, he muſt then bring a new original, and the judgment thereon had been a new recovery *(c)*; but now a *ſcire facias* is given by the ſtatute inſtead of an original *(d)*, and therefore a judgment thereon ſhall alſo be a new judgment; for though it is a judicial writ yet it is in the nature of an action, becauſe the defendant may plead any matter in bar of the execution upon the firſt judgment; and it is for this reaſon that a releaſe of all actions is a good bar to it *(e)*. Beſides, an action of debt will lie upon a judgment on a *ſcire facias (f)*; which ſhews that it is an action diſtinct from the original, and upon ſuch a judgment the defendant may be committed to priſon ſeveral years afterwards without a new *ſcire facias*. The huſband may have execution of a judgment recovered by him and his wife, after the death of his wife, without a *ſcire facias (g)*; for the judgment makes it a proper debt due to him, and he alone may bring an action of debt upon that judgment *(h)*; and it ſeems to be very unreaſonable that he ſhould have the benefit of ſuch a judgment, and yet not be charged after the death of his wife when there has been a recovery againſt both in her life-time. This is like the caſe where a *devaſtavit* is returned againſt huſband and wife as executrix, and a judgment thereon, *quod querens habeat executionem de bonis propriis*, yet if the wife die, the huſband ſhall be charged, for the debt is altered *(i)*. If it ſhould be otherwiſe this inconvenience would follow, that if the wife ſhould die the huſband will poſſeſs himſelf of her eſtate, and defraud the creditors; ſo that he takes her, but not *cum onere*: but the law is otherwiſe; for if *a feme*, being leſſee for years, marry, and the rent be behind, and ſhe die, the huſband ſhall be charged with the rent arrear, becauſe he is entitled to the profits of the land by his marriage *(k)*.

Obrian against Ram.

11. Mod. 177.
12. Mod. 290.

To which it was anſwered, that if a man ſhould marry an executrix, and then he and his wife be ſued, and judgment obtained

(a) Carth. 30. Salk. 116. Skin. 682. 4. Bac. Abr. 420.

(b) See the Year Book 49. *Edw.* 3. pl. 35. b. and Bro. Abr. title, "Baron and Feme," pl. 27.

(c) Year Book 1. *Hen.* 5. pl. 5. a. 43. *Edw.* 3. pl. 2. b.—See alſo 2. Salk. 660. Ld. Ray. 669. where Holt, *Chief Juſtice*, is of opinion, that a *ſcire facias* did lie at common law, upon a judgment in a perſonal action.

(d) Co. Lit. 290. b. 1. Sid. 351. 3. Co. 12. 4. Mod. 248.

(e) 2. Inſt. 469, 470. See Ld. Ray. 806. Salk. 600.

(f) Raſtal's Entries, 193. 4. Leon. 186. Dyer, 214. b.

(g) 1. Mod. 179.

(h) See the caſe of Gabriel Miles, 1. Mod. 179. and Eyres *v.* Coward, 1. Sid. 337. *accord*. But ſee the caſe of Perroyer *v.* Brace, Ld. Ray. 244.; Wortley *v.* Rayner, Dougl. 637.

(i) Moor, 299. Cro. Eliz. 216. Cro. Car. 603.

(k) Fitz. Nat. Brev. 121. 1. Roll. Abr. 351. Year Book. 10. *Hen.* 6. pl. 11.

Obrian *against* Ram. against them to recover *de bonis testatoris*, and thereupon a *fieri facias* is awarded to levy the debt and damages, and the sheriff returns a *devastavit*, and then the wife dies, the husband is not chargeable, because the judgment is not properly against him, for he is joined
* [190] only for conformity; but if, * upon the return of the *devastavit*, there had been an award of execution *de bonis propriis*, that would have been a new judgment, and the old one *de bonis testatoris* had been discharged, and then the husband must be charged for the new wrong.

1. Roll. Abr. 351.

Adjournatur.

Afterwards, in 1. *Will. & Mary*, the judgment was affirmed.

Case 115.

Bowyer *against* Lenthal.

A declaration stating a promise to pay *quantum rationabiliter valerent*, instead of *valebant*, is good after verdict.

INDEBITATUS ASSUMPSIT, with counts of *quantum meruit* and *insimul computasset*. The plaintiff had a judgment by default in the court of common pleas, and a writ of enquiry was brought, and entire damages given; and now the defendant brought a writ of error.

It was argued, that if any of the promises be ill, judgment shall be reversed.

Moor, 702. 1. Roll. Abr. 30. Noy, 83. Co. Eliz. 149. Cro. Car. 77. 53. Yelv. 134. 2. Lev. 119.

The error now assigned was in the second promise, *viz* that in consideration that the plaintiff would let the defendant have meat, drink, and lodging, he promised to pay so much *quantum rationabiliter valerent*, and it should have been *valebant*, at the time of the promise made.

Sed non allocatur.—So the judgment was affirmed.

1. Vent. 262. 2. Vent. 71. 75. 1. Ld. Ray. 148. 284. 408. 669. 2. Ld. Ray. 838. 982. 1223. 8. Mod. 70. 240. 380. 356. 10. Mod. 145. 185. 210. 230. 310. Comyns, 12. 89. 116. 557. 2. Barnes, 360. 1. Salk. 25. 457. 1. Bac. Abr. 178, 179. Dougl. 683.

EASTER TERM,

The Fourth of James the Second,

IN

The King's Bench.

Sir Robert Wright, *Knt. Chief Justice.*
Sir Richard Holloway, *Knt.*
Sir Thomas Powell, *Knt.* } *Justices.*
Sir Richard Allibon, *Knt.*
Sir Thomas Powis, *Knt. Attorney General.*
Sir William Williams, *Knt. Solicitor General.*

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* Memorandum. Case 116.

NOTA, *Wednesday May* 2, being the first day of this Term, SIR BARTHOLOMEW SHOWER, *Recorder of London*, was called within the bar.

Heyward *against* Suppie. Case 117.

ACTION OF COVENANT.—The covenant was to make such an *assignment* to the plaintiff, according to an agreement made between him and the defendant, as counsel should direct and advise; and for non-performance thereof this action was brought. The defendant pleaded *non est factum*, and judgment was obtained against him. Upon which a writ of error was brought, and the common error assigned.

On a covenant to make such an *assignment* as counsel shall advise, it is incumbent on the covenantor to procure the advice of counsel.

It was objected, that the plaintiff's counsel should give the advice; because he is the person interested.

1. Roll. Abr. 423. Moor, 595. 5. Co. 23. Cro. Eliz. 716. 1. Leon. 105. 2. Lev. 95. Owen, 157. Dougl. 689.

MR. POLLEXFEN answered this objection, and said, that the defendant had likewise an interest in this matter, for it is an advantage to him to make the assignment that his covenant might be saved: it is true, it had been otherwise if the covenant had been

3. Mod. 75. 2. Com. Dig. "Condition" (H.).

HEYWARD *against* SUPPIE.

to make such a *conveyance* as counsel should * advise, for then the person to whom the covenant is made may chuse whether he will have a feoffment, a release, or a confirmation, and then his counsel should advise what sort of conveyance is proper. But here it is to make *an assignment*, and such as the parties had agreed on. If a man should be bound to give another such a release as the judge of the prerogative court shall think fit, the person who is so bound must procure the judge to direct what release shall be given (*a*), because the condition is for his benefit, and he has taken upon him to perform it at his peril. It is usual for men to have counsel on both sides, to put their agreements into method; but in this case, it being left generally "as counsel shall direct," what reason can be given why the defendant's counsel shall not be intended, especially when it seems, by the penning of the covenant, he shall? for an assignment is to be made "as counsel shall direct;" and here being a verdict for the plaintiff, it must now be presumed that the defendant's counsel was first to give the advice, and then he was to make the assignment.

1. Ld. Ray. 279. 750. 8. Mod. 42. 173. 232. 10. Mod. 153. 223. 505. 1. Stra. 616. 712.

E CONTRA. It was argued, that first as to the verdict, it is not materially objected in this case, because the plea is *non est factum*, so that nothing of the special matter could come in evidence. Now admitting this covenant to be general, yet one of the parties must make his choice of counsel before he can entitle himself to an action. All deeds are taken according to the general intendment (*b*), and therefore by this covenant his counsel is to advise to whom the assignment is to be made; for if the counsel of the defendant should advise an insufficient deed, that would not have saved his covenant. Besides, the plaintiff has not averred that counsel did not advise, and therefore the defendant could not plead any thing but *non est factum*.

Adjournatur.

(*a*) Lamb's Case, 5. Co 1. Roll. Abr. 424. pl. 8.
(*b*) 3. Bulst. 168.

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Case 118. Anonymous.

Quære, If a custom of *London*, that the Company of Porters shall have the exclusive right to unlade all coals and grain that should arrive at such a wharf, be good?—Ante, 159. 1. Roll. Abr. 365. 5. Co. 63. Moor, 580. Hard. 56. 2. R... Rep. 201. 4. Mod. 228. Ray. 288. 294. 1. Sid. 284. 1. Lev. 229. 8. Co. 125. Stra. 675. 1. Ld. Ray. 113, 496. 8. Mod. 211. 267. 10. Mod. 131. 338. 11. Mod. 132. 188. 12. Mod. 270. 686. Fitzg. 309. 1. Stra. 462. 537. 675. 2. Stra. 1085. 1. Ld. Ray. 113. 496. 1. Burr. 127. 2. Burr. 892. 3. Burr. 1324. 4. Burr. 1951. Andr. 91. 1. Bac. Abr. 342. Comp. 270. Dougl. 218.

A PLEINT was removed out of the LORD MAYOR's COURT by *habeas corpus*, the return whereof was, That the city of *London* was an ancient city incorporate, and that time out of mind there was a custom that "the portage and unlading of all coals

"and

"and grain coming thither should belong to the mayor and aldermen, &c.;" that there was a custom for them to regulate any custom within the city, &c.; and then they set forth an act of common council, by which THE PORTERS of *Billingsgate* were made a fellowship; that THE METERS of corn shall from time to time give notice to THE PORTERS to unlade such corn as should arrive there; that no *bargeman*, not being free of the said fellowship, shall unlade any corn, upon the forfeiture of twenty shillings, to be recovered in an action brought in the name of THE CHAMBERLAIN; and that the party offending shall have no essoign, or wager of law: then they set forth the judgment in the *quo warranto*, and the re-grant *(a)*, and that the defendant, not being of the said fellowship, did unlade one hundred quarters of malt, &c. ANONYMOUS.

THOMPSON, *Serjeant*, took many exceptions to this bye-law, but the most material were,

FIRST, It appears upon the return, that the city of *London* has assumed an authority to create a fellowship by act of common council, which they cannot do; for it is a prerogative of the crown so to do; and they have not averred or shewed any special custom to warrant such an authority.

SECONDLY, They have made this bye-law too general; for if a man should carry and unlade his own goods there, he is liable to the forfeiture; in which case he ought to be excepted.

THIRDLY, This act of common council prohibits *bargemen*, not being free of the fellowship of *porters*, to unlade any coals or grain arriving there, and they have not averred that the malt unladed did arrive, &c. so they have not pursued the words of the bye-law.

FOURTHLY, They say, in this law, that the person offending "shall have no essoign, or wager of law," which is a parliamentary power, and such as an inferior jurisdiction ought not to assume *(b)*.

Adjournatur (c).

(*a*) 3. St. Trials, 545. 2. Show. 263.
(*b*) Godb. 107.
(*c*) See Barnardiston's Case, 1. Lev. 14, 15.; Cuddon *v.* Provost, 6. Mod. 123. 1. Salk. 143.; the Frame Knitters *v.* Green, 1. Ld. Ray. 113.

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Beak *against* Thyrwhit. Case 119.

THERE was a sentence in the *Court of Admiralty* concerning the taking of a ship; and afterwards an executrix brought an action of trover and conversion for the same.

If a ship illegally trading in the *East Indies* be seized at sea and condemned as forfeited before a court of admiralty of competent jurisdiction, *trover* will not lie to recover her back after such sentence; but it must be shewn that the court of admiralty had competent jurisdiction.—S. C. Carth. 31. S. C. 1. Show. 6. S. C. Comb. 120. S. C. Bro. Ent. 69. S. C. Holt, 47. 1. Vern. 21. 10. Mod. 78. 12. Mod. 16. 134. 143. 246. 2. Stra. 1078. 3. Term Rep. 344.

The defendant, after an imparlance, pleads, that, at the time of the conversion, he was a servant to *King Charles the Second*, and a captain of a man of war called THE PHOENIX, and that he seized the said ship for the governor of the *East-India Company*, she going in a trading voyage to the *Indies* contrary to the king's prohibition, &c.

And, upon a demurrer, these exceptions were taken to this plea.

FIRST, The defendant sets forth that he was a servant to the king, but has not shewed his commission to be a captain of a man of war.

SECONDLY, That he seized the ship going to the *Indies* contrary to the king's prohibition, and has not set forth the prohibition itself.

It was argued by the counsel *contra*, That it may be a question, Whether it was a conversion for which this action is brought? for it was upon the sea, and the defendant might plead to the jurisdiction of this court, the matter being then under the cognizance of the admiralty. But as to the substance of this plea, it is not material for the defendant either to set forth his *commission* (*a*) or the king's *prohibition*; he has shewed enough to entitle the court of admiralty to a jurisdiction of this cause, and therefore this court cannot meddle with it; for he expresly affirms that he was a captain of a man of war, and seized this ship, &c. which must be intended upon the sea; so that the conversion might afterwards be upon the land; yet the original cause arising upon the sea, shall and must be tried in the admiralty (*b*); and it having already received a determination there, shall not again be controverted in an action of trover. The case of *Mr. Hutchinson* (*c*) was cited to this purpose. He had killed *Mr. Colson* in *Portugal*, and was acquitted there of the murder; the exemplification of which acquittal he produced under the great seal of that kingdom, on his being brought from *Newgate* by an *habeas corpus* to this court: but, notwithstanding his acquittal there, the king was very willing to
* [195] have him tried here for the fact; and he referred the * consideration thereof to the Judges, who all agreed, that he, being already acquitted by their law, could not be tried again here.

Adjournatur (*d*).

(*a*) See the case of Berryman *v.* Wise, 4. Term Rep. 366. and the case of W. and T. Gordons, Cases in Crown Law, 2d edit. 416.

(*b*) Cro. Eliz. 685.

(*c*) 3. Keb. 765. Bull. N. P. 245.

(*d*) This case was argued again in Easter Term 1. *Will. & Mary*, and Judgment given by THE WHOLE COURT in favour of the plaintiff, S. C. 1. Show. 6. upon the insufficiency of the defendant's plea, S. C. Carth. 32. because he did not shew by what authority he seized the ship, or before whose court of admiralty, or by what judge she was condemned: but they held, that the stating himself *captain* generally was sufficient, and that there was no necessity to shew his commission, S. C. Comb. 120; but if the plea had been good, the sentence in the admiralty court would have been final, and the taking not triable in trover, S. C. 1. Com. Dig. 274. *fo. edit.*; for a final determination in a court having competent jurisdiction is conclusive in all courts of concurrent jurisdiction. Bull. N. P. 245. See also the case of Ladbroke *v.* Cricket, 2. Term Rep. 649.; Lord Camden *v.* Howe, 4. Term Rep. 382. H. Bl. Rep. 476.

Smith *against* Pierce. Case 120.

Trinity Term, 3. Jac. 2. Roll 1160.

If a term for years be devised for the payment of debts, with remainder over in tail, and he in remainder enters and levies a fine and settles the land upon his wife for life and dies: *quære*, If the wife survive and the debts be not paid, whether this term is barred by the fine and non-claim?

A SPECIAL VERDICT was found in ejectment, the substance of which was, That *Robert Basket* was seised in fee of the land in question; and by his will devised it to *Philip Basket* and others for ninety-nine years, with power to grant estates for the payment of the debts and legacies of the testator; the remainder in tail to *John Basket* his brother; but that if he gave security to pay the said debts and legacies, or should pay the same within a time limited, that then the trustees should assign the term to him, &c. *John Basket* entered after the death of his brother, with the assent of the said trustees, and received the profits, and paid all the legacies and all the debts except eighteen pounds.

THE JURY find, that *John* had issue a daughter only by his first wife, after whose death he married another woman, and levied a fine, and made a settlement in consideration of that marriage upon himself for life, and upon his wife for life, with divers remainders over; that he died without issue by his second wife; that the second wife entered, and five years were past without any claim, &c.; and now the heir at law, in the name of the trustees brought this action.

S.C. 1. Show. 72. S.C. Comb. 145. S.C. Carth. 100.

The questions were,—FIRST, Whether the term for ninety-nine years, thus devised to the trustees, was bound by this fine and non-claim, or not?—SECONDLY, Whether it was divested and turned to *a right* at the time of the fine levied? for if it was not, then the fine could not operate upon it.

It was agreed, that as *a disseisin* is to a freehold, so is *a divesting* to a term; and that a fine and non-claim is no bar, but where the party at the time of the levying thereof had a will to enter, and when the estate of which it is levied is turned to a right: that in the case at the bar the entry of *John Basket* was tortious, because the legal estate was still in the trustees; but that if he had gained any right by his entry, it is only a tenancy at will to them, for they took notice of the devise, and he entered by their consent; and such a right is not assignable; and then a fine levied is no bar. * To prove this *Margaret Prodger's Case (a)* was cited, where the lord granted a copyhold to *John*, *Elizabeth*, and *Mary*, for their lives, and afterwards, by deed enrolled, sold the land to *John* in fee, and levied a fine to him and his heirs, &c.; and five years passed without any claim: *John* died; his son entered, and levied another fine to trustees, to the use of himself and *Margaret* his wife for life, the remainder to his own right heirs; the son died and his wife survived, who, having a freehold for life, distrained; and the husband of *Elizabeth* brought a replevin: and it was adjudged that this fine and non-claim did not bar those in remainder, because the bargain and sale to *John* did not divest their estate and turn it

5. Co. 124. Cro. Eliz. 15. 3. Leon. 156. 1. Vern. 132. 226. 2. Vern. 189. 368. 662. 9. Mod. 103. 181. 196. 210. 10. Mod. 179. 245. 436. 11. Mod. 103. 181. 196. 210. 12. Mod. 32. 38. 513. Gilb. E. R. 17. 18. Fitzg. 102.

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Comy. 119. 369. Cases T. T. 164. 237. 1. Peer. Wms. 520. 777. 2 Peer. Wms. 146. 535. 3 Pi. Wms. 171. 208. 310. 372. 1. Ld. Ray. 33. 177. 728. 782. 3. Co. Dig. 357. 3. Bac. Abr. 446. 450.

(a) 9. Co. 106.

SMITH *against* PIERCE.

to a right *(a)*; for the lord did what he might do; and *John* accepted what he might lawfully take, who, being in possession by virtue of a particular estate for life, could not by this acceptance divest the estate of her who had the freehold; and the fine and non-claim could not do it; for to what purpose should he make any claim, when he was in actual possession of the thing to be demanded? And he who is so in possession need not make any claim, either to avoid a fine or a collateral warranty. Now though at the common law there must be livery and seisin to create an estate of freehold *(b)*, yet any thing is sufficient to make an estate at will, in which neither the inheritance nor the title of the land is concerned; and therefore a fine levied by such a tenant is no bar.

Ld. Ray. 707
1 Vern. 132
226.
8. Mod. 55.
10. Mod. 179.
245.
11. Mod. 121.
Gilb. E. R. 18.

It is true, if a lease be made for an hundred years in trust to attend the inheritance, and *cestuy que trust* continues in possession, and demises to another for fifty years, and levies a fine, and the five years pass without claim, he, being still in possession after the first lease made, is thereby become tenant at will; and by making the second lease, the other is divested and turned to a right, though he was not a disseisor, and so it is barred by the fine, because the *cestuy que trust* of the term of one hundred years was also owner of the inheritance *(c)*. But in the case at the bar *John* shall not be a disseisor, but at the election of the trustees of the term of ninety-nine years; to prove which there are many authorities in the Books *(d)*. As if tenant at will make a lease for years, and the lessee enters, it is not a *disseisin*, but at the election of him who has the freehold *(e)*; and even in such case, if the tenant of the freehold should make a grant of the land it is good, though not made upon the land itself, for he shall not be taken to be out of possession but

*[197] at his own election. * It is like the common case of a mortgagee for years, where the mortgagor continues in possession twenty years afterwards, and pays the interest, and in that time has made leases and levied a fine, this shall not bar the mortgagee, for the mortgagor is but tenant at will to him. The trustees need not make any claim in this case, because there was no transmutation of the possession, so they could take no notice of the fine. It is true, *John Basket* entered by their consent, but still as tenant at will to them; and the acts done by him after his entry will not divest this term; for though he made a bargain and sale of the lands, yet nothing will pass thereby but what of right ought to pass. He likewise demised the lands to under-tenants for years, but it is not found that they entered; but admitting they did enter, yet that could not displace this term, for these tenants claimed no more than for one or two years, and made no pretence to the whole term. But if by

(*a*) Raym. 147. Hardres, 401. Plowd. 435. 1. Vezey. 387. Shep. Touch. 23. 2. Burr. 704.
(*b*) Fermor's Case, 3. Co.
(*c*) Freeman *v.* Barnes, 1. Sid. 458. 3. Bac. Abr. 449.
(*d*) Doe on the Demise of Atkins *v.* Horde.
(*e*) Latch. 53. 1. Leon. 121. Lit. f. 588.—See Taylor *v.* Horde, 1. Burr. 60.; Goodtitle *v.* Duke of Chandos, 2. Burr. 1065. Stra. 860.

either

either of these acts the term should be divested, yet still it must be at the election of those who have the interest in it *(a)*. The case of *Blunden v. Baugh (b)*, which is grounded upon *Littleton's Text, sect.* 588. is an authority to this purpose. The father was *tenant in tail*, and his son, who was *tenant at will*, made a lease for years; then both father and son join in a fine to the use of the son for life, and to *Elizabeth* his wife for life, the remainder to the heirs males of the body of the son, who died without issue male; the lessee, being in possession, made a conveyance of the estate by bargain and sale to *Charles Lord Effingham*, who was son and heir of the tenant in tail; and he made a lease to the plaintiff, who was ousted by the defendant *Elizabeth*; and the question was, Whether by the entry of the son, who was *tenant at will*, and his making of this lease, the father was disseised of the freehold? And it was held not; for it was found in the verdict, that he occupying at will and entering by his father's assent, the lease was also intended to be made by his assent.

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But *on the other side* it was said, that this fine was a bar by the express words of the statute of 4. *Hen.* 7. c. 24. which excludes in all cases but where there is fraud, or the person is incapable, or where the right to be barred is not divested. * In this case *John Basket* had an interest and present right, and though it be clothed with a trust, yet that will not make any difference. Here is no fraud, for the fine was levied by tenant in tail in possession; but if there had been fraud it ought to be found, otherwise it shall not be presumed *(c)*. This is not like *Blunden's Case*, for there the son was tenant at will, but it is not found by this verdict that *John* occupied at will. There is no difference between this term and a trust of a term to attend the inheritance, whose interest shall be barred by such a fine and non-claim, because the trust is included in the fine, and therefore the trustees, not making of their claim within the five years, are for ever excluded. It cannot be denied but that a term for years is such an interest as may be barred by fine; it is *Saffin's Case (d)* expresly, which was a lease for years, to commence *in futuro* after a lease then in being should be determined; the first lease ended; the second lessee did not enter, but the reversioner did, and made a feoffment, and levied a fine, and five years passed without entry or claim by the second lessee; and it was adjudged, that this fine was a bar to him; for when his future interest commenced, then, and not before, he had such a present interest in the land as might be divested and turned to a right.

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1. Ld. Ray. 179.

To which it was answered, that this differs from *Saffin's Case*, which was an *interesse termini*; and *Alport's Case*, which was an executory devise. If *John Basket* had still continued in pos-

(*a*) Dyer, 61. 173.
(*b*) Cro. Car. 302. 1. Roll. Abr. 661.
(*c*) Cro. Car. 550. 10. Co. 56.
(*d*) 5. Co. 123.

session,

SMITH *against* PIERCE.

session, it might have altered the case; but he died, and his wife entered, and then the five years passed without any claim.

Adjournatur (*a*).

(*a*) This case was argued again in Michaelmas Term 1. *Will. & Mary*, S. C. Comb. 148. S. C. Carth. 100. but no judgment appears to have been given. LORD CHIEF BARON GILBERT, however, in noticing this case, says, that upon the difference taken in the case of *Freeman v. Barnes* it should seem, that the term was not barred, for then it must turn to the prejudice of honest creditors, who were strangers and third persons; and *John Basket* by his entry on the *trustees* could be only *tenant at will*, because his entry was with their consent, and no manner of intent appears in him to divest their estate or interest, and then his fine shall operate only on his own estate-tail, like a fine levied by a mortgagor, who is but tenant at will to the mortgagee, and whose acts being by permission of the mortgagee shall not turn to his prejudice; though (he continues) some said the five years and non-claim passing in the life-time of the wife, who was the survivor, made a great difference in the case; *ideo quære*. 3. Bac. Abr. "Leases," 450. See S. C. Show. 74. Saffyn's Case, 5. Co. 124.; Edwards v. Slater, Hard. 410.; Focus v. Salisbury, Hard. 400.; Cabol v. Stone, Ray. 140.; Freeman v. Barnes, 1. Vent. 55. 1. Lev. 1. 270. Cruise on Fines, 194. 243. Earl Pomfret v. Lord Windsor, 2. Vezey, 472. 3. Com. Dig. "Fine" (I. 3), Drapers Company v. Yardley, 2. Vent. 662.

Case 121. Evans *against* Crocker.

A declaration in ejectment, on a demise dated 12. *June*, HABENDUM *a prædicto die*, by virtue of which he *entered*, and that the defendant afterwards, *on the said* 12 *June*, did eject him, is bad. *Sed quære.*

A SPECIAL VERDICT IN EJECTMENT was found in *Ireland*, and judgment given there for the plaintiff; and now a writ of error was brought in this court, and the common error assigned.

The objection was, That the plaintiff had declared upon a demise made on the twelfth of *June*, &c. HABENDUM *à prædicto duodecimo die Junii* (which must be the thirteenth day of the same month) *usque, &c. virtute cujus quidem dimissionis* he entered, &c. and that the defendant *postea*, SCILICET *eodem duodecimo die Junii*, did eject him, &c.: so that it appears, upon the face of the declaration, that the defendant entered before the * plaintiff had a title; for the lease commenced on the thirteenth of *June*, and the entry was on the twelfth of that month. And it was said, that this agrees with a former resolution in this court, where the lease was made the 24th of *June* for five years, HABENDUM *à die datus*, which must be the 25th, by virtue whereof the plaintiff entered; and that the defendant *postea*, SCILICET 24*th Junii*, did eject him, which must be before the commencement of the lease (*a*).

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Cro. Jac. 96. 154. 258. 312. 652. 2. Bulst. 29. 1. Sid. 8. Cro. Eliz. 766. Comb. 83. 5. Co. 1. 1. Barnes, 12. 2. Barnes, 153. 10. Mod. 2. 177. 265. 12. Mod. 113. 125. 2. Stra. 1086. Ld. Ray. 728. 870. Run. Eject. 90.

(*a*) Goodaine v. Wakefield. 1. Sid. 8.; but see the case of Adams v. Gosse, Cro. Jac. 96. where in ejectment on a lease dated 6. September the plaintiff declared, that he was possessed until the defendant *postea*, on the 4th September, ejected him, and held good. See also Bull. N. P. 106. The old distinction between *the date* and the *day of the date* seems now to be abolished by the determination of the king's bench, in the case of Pugh v. Duke of Leeds, in Mich. Term 18 *Geo.* 3. for that both these expressions shall be construed indifferently, either *inclusively* or *exclusively*, so as to give effect to the deed in which they are used, Cowp. 714. Run. on Eject. 90.; and see Powell on Powers, 492. to 533. where all the cases upon this subject are collected. See also Knox v. Simmonds, 3. Brown's Ch. Cas. 358.

CURIA. The plaintiff entered as *a disseisor* by his own shewing.. And thereupon judgment was reversed. EVANS *against* CROCKER.

The King *against* Kingsmill. Case 122.

Grant of an hundred, where good, &c.

QUO WARRANTO against the defendant, to shew cause why he executed the office of a *Bailiff of the Hundred* of *Barnstaple*.

The defendant pleaded, that the said hundred was an ancient hundred; that the office of bailiff was an ancient office; that the hundred court was an ancient court, held from three weeks to three weeks before the steward thereof; that the return of writs was an ancient liberty and franchise which did belong to the said bailiff; that king *Charles the First* was seised of the said franchise *jure coronæ* in fee, and by letters patents dated, &c. granted the same to one *North*, HABENDUM the said hundred to him and his heirs; and that by several *mesne* assignments it came to, and was vested in, the defendant: and so he justified to have *retorna brevium*.

1. Vent. 399. 412. 2. Show. 98. Fitz. 153. 294. 10. Mod. 125. 129. 12. Mod. 18. 35. 165. 524. 643. 666. 2. Peer. Wms. 400. 2. Stra. 810. 3. Com. Dig. 410.

To this plea the plaintiff demurred.

It was argued, *for the king*, that this claim was not good.—FIRST, as to the manner of the grant as it is here pleaded, *viz.* that the king was seised in fee, &c. and that he granted the *franchise* HABENDUM the said *hundred*, for that such a grant can never include the hundred, as nothing can pass by the *habendum* but what is mentioned in the *premisses*.

SECONDLY, The defendant has derived a title from the crown to this office of a bailiff, which must be either by grant or prescription. * It cannot be by grant, for it is a question whether the *hundred court* can now be separated from the *county court*; it has been derivative from it in former times, when the sheriffs did let those hundreds to farm to several persons, who put in *bailiffs errant*, to the great oppression of the people; which was the occasion of the making of the statute of 14. *Edw.* 3. c. 9. by which such hundreds were united and rejoined to the counties, as to the bailiwicks thereof, except such as were then granted in fee by the king or his ancestors *(a)*. Now these hundreds were usually granted to abbots and other religious persons, and their possessions coming afterwards to the king by the dissolution of their abbies and monasteries *(b)* are now merged in the crown, and cannot be regranted after the making of that statute. And as the defendant cannot have a title by grant, so he has not prescribed to have this office. It is true, the plea sets forth that it is an ancient office, but that is not a prescription, but a bare averment of its antiquity. But admitting he had alledged it by way of *prescription*, he could not do

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(a) 4. Inst. 267.
(b) By the statute 31. *Hen.* 8. c. 13.

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it by a *que estate* to have *retorna brevium (a)*. A man cannot prescribe to have cognizance of pleas in an hundred court; he may in a county palatine, because it is of a mixed jurisdiction *(b)*. Neither can he prescribe to have return of the king's writs, because they are matter of record *(c)*.

E contra. Here is a good title pleaded. It was never yet denied, but that the king may be seised in fee of an hundred, and that he may grant *retorna brevium*; the statutes are plain in it *(d)*; for otherwise how came any lords to have hundreds in fee, but by the king's grants? And it is as plain that hundreds may be divided from the county; for else to what purpose was the statute of *Lincoln* made *(e)*, which adjoins hundreds and wapentakes to the counties, and provides that they shall never be separated again; which shews that they were divided at that time. The objections which have been made are, *viz.* That the defendant cannot have a title to this office by grant, and he has not made any prescription to it. The reasons given why he could not have it by grant were, because ancient hundreds which were united to the counties by the statute of 2. *Edw.* 3. c. 12. could never afterwards be divided from them by any grant of the king; those which were excepted in that sta-

* [201] tute, as being granted in fee by the king or his * ancestors, when they come again to the crown, cannot be regranted, because they are merged in it.

3. Com. Dig. "Franchises" (G. 1.).

In answer to this it was said, that such ancient liberties which were created by the crown, and did subsist by the king's grant before the statute of 2. *Edw.* 3. c. 12. when afterwards they came to the king, were not merged, but remained a distinct interest in him. The hundred of *Gartree* in the county of *Leicester* was such a liberty; it was an ancient hundred, and granted by *Edward the Second* to *John Sedington*, not in fee, but *durante bene placito regis*: this grant was long before the making of the statute of *Edward the Third*; and yet afterwards this very hundred was granted to several other persons by the succeeding kings of *England*, which shews it was not merged in the crown when it came to the king *(f)*.

Retorna brevium doth not lie in prescription.

Moor, 670. Hard. 423. 1. Vent. 405.

The other objection was, that *retorna brevium* doth not lie in prescription. Now as to that, though it be true, that no title by prescription can be made to such franchises and liberties which cannot be seized as forfeited before the cause of forfeiture appears on record; because prescription, being an usage *in pais*, does not extend to such things which cannot be had without matter of record; yet my *Lord Coke (g)* is clear that a good title may be made to hold pleas, leets, hundreds, &c. by prescription only, without matter of record.

(a) Year Book 14. *Hen.* 4. pl. 89.

(b) But see Co. Lit. 114. and Com. Dig. "Courts" (P 3.) and "Franchises" (D 1.)

(c) See the case of the Abbot de Strata Marcella.

(d) See 14. *Edw.* 3. c. 9. and 2 *Edw.* 3. c. 12.

(e) 2. *Edw.* 3. c. 12

(f) Cole *v.* Ireland, Raym. 360. 2. Show. 98.

(g) Co. Lit. 114. b.

But,

But, notwithstanding what was said to maintain this plea, judgment was given against the defendant.

THE KING *against* KINGSMILL.

The King *against* Griffith.

Case 123.

THE DEFENDANT was convicted of manslaughter at the OLD-BAILEY, and the record being removed into this court by *certiorari* he pleaded his pardon, and had judgment *quod eat inde sine die*.

Indictment for murder; the party was found guilty of manslaughter, and pleaded his pardon, and afterwards the indictment was quashed to save the forfeiture of his goods.

But being once *convicted*, the dean and chapter of *Westminster* seized his goods, as forfeited by that conviction.

He thereupon (although he was out of the court by that judgment) moved by his counsel to quash the indictment.

The exceptions taken were,—FIRST, That the indictment was *per sacramentum duodecim proborum et legalium hominum jurat. et onerat. præsentat. existit modo et formâ sequen.* "MIDD. SS. *Juratores pro domino rege præsentant, &c.*" * and there was no precedent to warrant such an indictment, for this may be the presentment of another jury; it being very incoherent to say that "it was presented "by the oaths of twelve men, that the jury do present." It ought to be *præsentat. existit quod, &c.*; and so is the form of this Court, as THE CLERK OF THE CROWN informed them.

8. Mod. 296. 2. Ld. Ray. 1039. 2. Hawk. P. C. 361.

* [202]

SECONDLY, They present, that *Griffith* and two others did make an assault on the body of the deceased, and that *quidem* JOHANNES *in nubibus* did wound him with a *gun*; so that it is uncertain who did shoot, and what *gun* was discharged, which ought to be certainly laid in the indictment. *Vaux's* indictment for poisoning *Ridley* was, that the said *Ridley*, not knowing the beer to be poisoned, but being persuaded by *Vaux*, *recipit et bibit*, but did not say *venenum prædictum*; and so it not appearing what thing he did drink (which ought to have been expresly alledged), the indictment was held insufficient *(a)*. And the reason is plain, for an indictment for felony, being a declaration for the king against the life of a subject, ought to set forth a sufficient certainty of the fact, which shall not be supplied either by argument or any intendment whatsoever. And therefore in *Long's Case* (*b*) the defendant was indicted for discharging a gun upon *Long*, "*duns eidem* HENRICO LONG *mortale vulnus*," and doth not say *percussit*, for which reason that indictment was also held insufficient; because in all indictments for murder they ought expresly to alledge a stroke given.

An indictment for murder, stating that the prisoner and two others made the assault, and that another person did wound the deceased with a gun, without stating the kind of gun, and who discharged it, is bad.

12. Mod. 118. 1. Ld. Ray. 145. 2. Ld. Ray. 1169.

For these reasons the indictment was quashed, and a new roll was made, on which this indictment and *certiorari* were both entered, and judgment *quod exoneretur*; and this was done to avoid the seizure.

And afterwards in *Michaelmas Term* the first of *William & Mary* it was said by THE CHIEF JUSTICE, that it must be intended

(*a*) Vaux's Case, 4. Co. 44. b. (*b*) 5. Co. 122. b.

these

THE KING *against* GRIFFITH.

these were two persons, for no Court would justify such a judgment.

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Case 124.

* Anonymous.

A traverse must not conclude to *the country*; for it is in the negative.

Carth. 300. 10. Mod. 253. 302. 2. Stra. 837. 5. Com. Dig. "Pleader" (G. 1.). 4. Bac. Abr. 69. Cowp. 575. 2. Burr. 1022. 2. Wils. 352. And see the case of Haywood *v.* Davies, 1. Salk. 4.; Robinson *v.* Rayley, 1. Burr. 317.; Boyce *v.* Whitaker, Dougl. 95.; Smith *v.* Dover, Dougl. 427.; Hedges *v.* Sandon, 2. Term Rep. 439.

ASSAULT AND BATTERY.—The defendant pleaded *a release* of all actions, &c. The plaintiff replied, that the release was gotten by *duress*, &c. The defendant rejoined, and shewed cause why it was not gotten by *duress*, but that he sued forth a *capias*, and arrested him, &c. and that the release was voluntary, &c. The plaintiff surrejoins, and says, that it was gotten by *duress*, ABSQUE HOC that it was voluntary; *et hoc petit quòd inquiratur per patriam.* Upon this issue the cause was tried, and the plaintiff had a verdict.

It was now moved in arrest of judgment, that he ought not to conclude to *the country* after a traverse, because a traverse itself is negative, and therefore the defendant ought to have joined issue in the affirmative (*a*). It is true, if issue had been joined before the traverse, it might have been helped by the statute of Jeofails, but it was not so in this case.

And therefore the judgment was arrested.

(*a*) Dyer, 353. a. Co. Lit. 126. a. Cro. Car. 316. 1. Sid. 341. Cro. Jac. 588. 2. Roll. Rep. 186.

Case 125.

Hitchins *against* Basset.

If a testator make two wills, and a special verdict find the first will *in hæc verba*, and also that he afterwards made another *will*, but of this second will the jurors do not know the contents, the last will thus found is no *revocation* of the former will.

EJECTMENT upon the demise of *Mr. Nosworthy.*—The jury found a special verdict, the substance of which was, That *Sir Henry Killigrew* was seised in fee of the lands in question, in the county of *Cornwal*; and, being so seised, did, in the year 1644, devise the same to *Mrs. Berkley* for life, remainder over to *Henry Killigrew* in tail; that he made *Mrs. Berkley* executrix of his will, which was found *in hæc verba*; that afterwards, in the year 1645, the said *Sir Henry Killigrew* made *aliud testamentum* in writing, but what was contained in the said last mentioned will *juratores penitus ignorant*; that *Sir Henry Killigrew* in the year 1646 died seised of those lands; that *Mrs. Berkley* and *Mr. Killigrew* conveyed the same to *Mr. Nosworthy*'s father, whose heir he is; and that the defendant *Sir William Basset* is cousin and heir to *Sir Henry Killigrew*, &c.

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S. C. Comb. 90. 209. S. C. 1. Show. 537. S. C. Salk. 592. Show. Cas. Parl. 146. S. C. Hard. 375. 1. Vern. 23. 97. 141. 182. 329. 2. Vern. 742. Prec. Ch. 459. Comyns, 250. 451. 1. Mod. 7. 68. Gilb. E. R. 130. 137. 1. Peer. Wms. 343. Cowp. 88.

* The question upon this special verdict was, Whether the making of this last will was a revocation of the former or not?

Mr.

Mr. Finch in this Term, and Maynard, *Serjeant*, in *Michaelmas Term* following, argued *for the plaintiff*, that it was not a revocation. In their arguments it was admitted, that a will in its nature was revocable at all times, but then it must be either by an express or implied revocation; that the making of this latter will cannot be intended to be an implied revocation of the former; for if so, then the land must also be supposed to be devised contrary to the express disposition in the first will, and that would be to add to the record, which finds, that what the last will was *penitus ignorant*. It is possible that a subsequent will may be made so as not to destroy but consist with the former; for the testator may have several parcels of lands, which he may devise to many persons by divers wills, and yet all stand together. A man may likewise by a subsequent will revoke part and confirm the other part of a former will; and therefore admitting there was such a will in this case, it is still more natural that it should confirm than revoke the other. If the testator had purchased new lands, and had devised the same by a subsequent will, no person will affirm that to be a revocation of the former will. When a man has made a disposition of any part of his estate, it is a good will as to that part; so is likewise the disposal of every other part; they are all several wills; though, taken all together, they are an intire disposition of the whole estate. Nothing appears here to the contrary, but that the latter will may be only a devise of his personal estate, or a confirmation of the former, which the law will not allow to be destroyed without an express revocation. The case of *Coward v. Marshall* (*a*) is much to this purpose; it was, a devise in fee to his younger son; and in another will (after the testator's marriage to a second wife) he devised the same lands to his wife for life, paying yearly to his younger son twenty shillings; and it was the opinion of Anderson and Glanvil, *Justices*, that both these wills might stand together, and that the one was not a revocation of the other; because it appeared by the last will that he only intended to make a provision for his wife, but not to alter the devise to his son. * So where a man had two sons by several venters (*b*), and devised the lands to his eldest son for life, and to the heirs males of his body, and for default of such issue to the heirs males of his second son, and the heirs males of their bodies, remainder to his own right heirs, and then made a lease of thirty years to his youngest son, to commence after the death of the testator; the youngest son entered and surrendered the term to his elder brother, who made a lease to the defendant, and then died without issue; afterwards the youngest brother entered and avoided this lease made by his brother; it was held, that the lease thus made to him was not a revocation of the devise of the inheritance to his brother, though it was to commence at the same time in which the devise of the inheritance was to take effect, but it was a revocation *quoad* the term only; that the elder brother should not

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Cases T. T. 44. 80. 233. 276. 268.
Comy. 72. 123.
1. Peer. Wms. 59. 229. 397.
Fitzg. 14.
Ld. Ray. 829.
2. Vern. 409. 729.
Prec. Ch. 54. 338. 442. 461.
Gilb. E. R. 20.
8. Mod. 23.
9. Mod. 177.
10. Mod. 370.
1. Stra. 35. 487.
2. Stra. 1179. 1270.

(*a*) Cro. Eliz. 721. See also 1. Show. 541. and Gilbert on Wills, 15.

(*b*) Hodgkinson *v.* Wood, Cro. Car. 24. See also Co. Lit. 22. b. 1. Co. 104. 319.

enter

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enter during that time, for the devise shall not be revoked without express words; and that though the testator had departed with the whole fee without reserving an estate for life to himself, yet the law created such an estate in him till the future use should commence; and in such case the right heirs cannot take by purchase but by descent; so that here the inheritance in fee simple was not vested in the elder brother by descent, for then the lease which he made would be executed out of the fee, and the younger brother would be bound thereby. But in the case at the bar, there is no colour of a revocation. FIRST, Upon the nature of the verdict, to which nothing can be added. Neither can it be diminished, for whatever is found must be positive, and not doubtful, because an attaint lies if the verdict be false; therefore the Court cannot take notice of that which the jury hath not found. Now here the entry of the judgment is, "*quibus lectis, et auditis, et per curiam* "*hic satis intellectis, &c.*"; but what can be read or heard where nothing appears? The case in THE YEAR BOOK of the 2. *Rich.* 3. *pl.* 3. comes not up to this question: it was an action of trespass for the taking of his goods; the defendant pleaded, that the goods appertained to one *Robert Strong*, who before the supposed trespass devised the same to him, and made him executor, &c.; the plaintiff replied, that the said *Strong* made his last will, and did constitute him executor; * and upon a demurrer to this replication, because he had not traversed that the defendant was executor, it was argued for the plaintiff, that this last will was a revocation of the former, for though there were no express words of revocation, yet by the very making *another will* the law revoked the former; and to prove this, two instances were then given, *viz.* that if a man devise his lands to two, and by another will give it to one of them and die, he to whom it is devised by the last will shall have it. So likewise where the testator by one will gave lands to his son, and by another will devised the same again to his wife, and then made an alienation, and took back an estate to himself, and died; in an assise brought between the widow and the son, he was compelled by the Court to shew that it was his father's intention that he should have the land, otherwise the last devisee will be entitled to it. Now both these instances are not sufficient to evince that the last will in this case was a revocation of that under which the plaintiff claims, because those wills were contradictory to each other; for by one the land was devised to the son, and by the other to the wife; they both had their existence at one and the same time, and it appeared they were made to distinct purposes; but here nobody can tell what was designed or intended by the testator in this subsequent will. And therefore it has been held (*a*), that where a man devised legacies to his two brothers, and afterwards in his sickness was asked to leave legacies to his said brothers, he replied that he would leave them nothing, but devised a small legacy to his godson, and died; this discourse was set down

8. Mod. 49. Gilb. E. R. 255. 1. Ld. Ray. 142. 2. Ld. Ray. 1585. 9. Mod. 84. Fitzg. 187. 3. Peer. Wms. 493. 1. Stra. 514. 845. 2. Stra. 1019. 1089. 1145. 1185.

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Powell on Devises, 536. 12. Mod. 236. Prec. Ch. 33. 183. 514. 2. Ld. Ray. 968. 2. Vern. 200. 241. 495. 680. 720. 9. Mod. 154. 10. Mod. 94. 233. 521. 1. Peer. Wms. 304. 1. Peer. Wms. 332. (624). 3. Peer. Wms. 163. 346.

(*a*) Eyre's Case, Cro. Car. 51. and see Gilbert on Wills, 416. Godolphin 443. Perkins, 92. b.

in a codicil, which together with the will was proved in common form: this codicil was not a revocation of the legacies given to the brothers, because the testator took no notice of the will which he had made in the time of his health, and *non constat* what he intended by these words which were set down in the codicil. If therefore doubtful words shall not make a revocation of a former will, *à fortiori*, a subsequent will, especially when the contents of such will do not appear, shall not revoke a former.

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IT WAS ARGUED *for the defendant*: The only objection is, that a latter will being made, and it not appearing to the jury what was contained in that will, it can be no revocation, because no express words of revocation can be found, or any thing which is contradictory to the first * will; and without the one or the other a former will cannot be revoked. But this is contrary to all the authorities in the Books *(a)*, which shew that a testament which is good in the beginning may become void by the making of a subsequent will, by words of revocation, or by words contradicting each other; for in such cases it is not doubted but the first will is revoked. But the meaning must be, that by the very making of a latter will the first is become void. This may be collected from the nature of a will, which a man has power to alter in part or in all, at any time during his life; but when he makes a new will, it must be presumed that he declared his whole mind in it; for if his intentions are to alter any part, the law has appointed a proper instrument for that purpose, which is a codicil; but when he makes *aliud testamentum*, it is a sign that he intended nothing of his former will should take any effect, when he had so easy a method to alter it in part. Every subsequent act of the testator shews that he intends a revocation, either by word or deed; and there is great reason why it should be so, because every revocation of a will is in the nature of restitution to the heir. It cannot be denied but that a will might be revoked by words without writing, before the making of the statute against frauds, &c.; as if a man should say that he would alter his will when he came to such a place, and he should die before he came thither, this is a revocation *(b)*. But it never was yet controverted that a revocation may be by deed; as if a man devise lands to another, and afterward make a feoffment to the use of his will; this was always held a revocation *(c)*. So it is if lands which are well given by a will are afterwards, by another will, devised to the poor of the parish; though this last will is void *(d)*, because the devisees have not a capacity to take, yet it is a revocation of the first will; and shall a will which is lost be of less authority than such which is void? It is not denied but that there may be a subsequent will which may not contradict the first; so is *Coward's Case* *(e)*, where both

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(*a*) Lindwood, 175. Swinburn, part [illegible] sect. 14. Year Book 2. *Hen.* 5. pl. 3. Wentworth's Office of Executors, 443. —See also 8. Mod. 208. 9. Mod. 124. 10. Mod. 96. 375. 469.

(*b*) 1. Roll. Abr. 614. Dyer, 310. b.

(*c*) Hussey's Case, 1. Roll. Abr. 614.

(*d*) Frenche's Case, 1. Roll. Abr. 614.

(*e*) Coward v. Marshal, Cro. Eliz. 721.

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wills appeared to be consistent; but that is not parallel with this, because the jury has found that the testator made *aliud testamentum*, which word *aliud* imports a distinct will from the former.
[208] * It is agreed also, that a man may make many wills, and that they may stand together; and it must also be agreed that such are but partial wills, because they are but pieces of the whole, though written in several papers; but when it is found in general that *aliud testamentum* was made, it must naturally be intended of his whole estate. The case in THE YEAR BOOK of *Richard the Third (a)* is an authority in point, where in trespass the defendant justified the taking of the goods by virtue of a will by which they were devised to him, and of which will he was made executor; the plaintiff replied, that the testator made *another will*, and thereby did constitute him executor; and this was held a good replication without a traverse that the defendant was executor, because by the making of the second will the other was void in law; and therefore the shewing that he was executor was not to avoid the first will (which the law adjudges to be of no force), but to
2. Vern 209. 742. make to himself a title to the goods taken out of his possession. If a man should make twenty codicils without dates, they may all stand together; but if he make two wills without dates, they are both void: the reason is, because by the making of the latter will the first is destroyed; and it being uncertain which is the last, rather than the rules of revocation should be broken, they adjudge both to be void. It cannot be reasonably objected, that this later will may devise the same lands to the same person; for why should a man be thought so vain? Besides, if it was so, the plaintiff should have claimed under that will. But this cannot be the same will, because it is contrary to the verdict, which has not found it to be *idem*, but *aliud testamentum*; besides, it is in the case of an heir, who shall not be disinherited by an intendment that the later will is the same with the first. Neither can the statute of wills (*b*), have any influence upon this matter. It is true, at the common law no land could be devised by a will, but now by the statutes of 32. *Hen.* 8. c. 1. and 34. *Hen.* 8. c. 5. lands, &c. in *socage* may be devised by will; and if held in *knight's service*, then only two parts in three *(c)*; but it must be by the last will (*d*). Now how can any man say that this shall be a devise of the lands by the *last will* of the testator, when the jury find he made *aliud testamentum*, the contents whereof are not necessary to be shewed, because the defendant
[209] claims as heir, and not as executor? * It must not be intended that this will shall confirm or stand with the other, because the law is otherwise; and therefore if the plaintiff would have supported his will by which he claims, he ought to shew the other will; by which it must appear, that nothing is contradictory to it, or that it confirms the first; but if presumptions shall be admitted, it must be in favour of the heir, for nothing shall be presumed to disinherit him (*e*).

(a) Year Book 2. *Rich.* 3. pl. 3.
(*b*) 32. *Hen.* 8. c. 1. and 34. *Hen.* 8. c. 5.
(*c*) See 29. *Car.* 2. c. 3.
(*d*) Godolphin, 299.
(*e*) See Den *v.* Gaskin, Cowp. 661.

Afterwards,

Afterwards, in *Trinity Term*, in the fifth year of *William & Mary*, judgment was given for the plaintiff: A WRIT OF ERROR was brought in the house of peers to reverse that judgment, but it was affirmed *(a)*. **HITCHINS *against* BASSET.**

(*a*) The reason given by the Judges was, that it was not found that any lands were devised by this second will; and therefore it might, for any thing that appeared to the contrary, be consistent with the first will; and where the matter stands indifferently, the Court will not suppose a revocation of a will solemnly made: but HALE, *Chief Baron*, held, that a second, substantive, independant will, though it do not expresly import a revocation of a former will, nor pass any land, yet, in construction of law, it will amount to a revocation, S. C. Hard. 376. S. C. Show. P. C. 146. In the case Goodright on Demise of Rolfe *v.* Harwood, Hilary Term, 14. *Geo.* 3. where, in a special verdict, it was found, "that the testator made a will in the year 1748, wherein he devised real and personal estate to *A.*; and that in the year 1756 he made *another will*, wherein the disposition made to *A.* was different from the disposition in the will of 1748, but in what particulars is unknown; but that the jurors do not find that the testator cancelled the will made in 1756, or that the defendant destroyed the same; and what is become of it they are altogether ignorant;" the court of common pleas, except BLACKSTONE, *Justice*, held, that this second will was a revocation of the former, 3. Wils. 497. to 516. But, on a writ of error to the king's bench, this judgment was reversed, on the authority of the above case of Hitchins *v.* Bassett, 2. Black. Rep. 937.; and, on appeal to the house of lords, the judgment of the court of king's bench was affirmed. 7. Brown's Parl. Cases, 344. See also Willet *v.* Sandford, 1. Vezey, 178. 186. Powel on Devises, 540. 541. Harwood *v.* Goodright, Cowp. 88. Dougl. 40.

Anonymous.

Case 126.

By what words in a will the executor may have an *authority* only, without an *interest* in the thing devised.

A WRIT OF ERROR was brought to reverse a judgment in the common pleas, in an ejectment for lands in the county of *Essex*.

A special verdict was found, that *R. F.* was seised in fee of the lands in question; that he had issue two daughters, *Frances* and *Jane*; that his daughter *Frances* had issue a son *Philip*, and two daughters *Frances* and *Anne*; that *R. F.* the father devised to *Philip*, *Frances*, and *Anne*, the children of his daughter *Frances*, and to *Jane*, his other daughter, the rents and profits of his manor of *Spain* for thirty years, to hold by *equal parts*, VIZ. the three grandchildren to have one moiety, and his daughter *Jane* the other moiety; "and if it happen that either of them should die before the thirty "years expired, then the said term should be for the benefit of "the survivor;" and if they all died, then the same was devised over to other relations. Afterwards he made *a codicil* in these words, "I give power and authority to my executors to let my *whole* "lands for the term of thirty years, for the benefit and behalf "of my children." *Anne*, one of the grand-children, died without issue. *Frances*, another of the grand-children, died, but left issue.

1. Vern. 32. 353. 361. 425. 482. 2. Vern. 323. 430. 545. Prec. Ch. 163. 332. 1. Ld. Ray. 423. 612. 9. Mod. 104. 10. Mod. 522. 11. Mod. 108. 12. Mod. 227. 296. Gilb. E. R. 146. Comyns, 88. 1. Stra. 12. 280. 374. 529. 1. Stra. 1172. 1. Peer. Wms. 14. 21. 34. 96. 700. 2. Peer. Wms. 102. 3. Peer. Wms. 115. 158. Dougl. 574. 2. Term Rep. 721. 3. Brown, C. C. 324.

ANONYMOUS.

THE FIRST QUESTION was, Whether the power given to the executors by the *codicil* will take away that interest which was vested in the grand-children by the will?

*[210] * MR. APPLETON argued that it would not, because the executors had only a *bare authority* to let it or improve it for the benefit of the children, there was no devise of the land to them. If power be given to executors to sell lands, it is only an *authority*, and not an *interest* in them; but a bare authority only to let is of much less importance.

If a testator devise lands to *A.* and *B.* his grand-children, and *C.* his daughter, by *equal parts*, viz. a moiety to the grand-children, and a moiety to the daughter, the grand-children are *tenants in common.*

THE SECOND QUESTION. After the testator had devised the profits of these lands to his grand-children and daughter, equally to be divided during the term, and had provided that if any die without issue, that then it should survive, and if all die, then to remain over to collateral relations, &c. Whether *Frances* being dead, but leaving issue, her interest shall survive to *Philip*, or go to such her issue?

MR. APPLETON, as to that, held, that the testator made them *tenants in common*, by equal parts, and therefore he devised it by moieties, in which there can be no survivorship. It is like a devise to the wife for life, and after her decease to his three daughters "equally to be divided," and if any of them die before the other, then the survivors to be her heirs "equally to be divided," and if they all die without *issue* then to others, &c. the daughters had an estate tail, and there was no survivorship *(a)*. So in this case it shall never go to the third grand-child, as long as any issue of the second are living.

On the other side it was argued, that they are *jointenants* and not *tenants in common*; for the testator having devised one moiety to his three grand-children jointly by equal parts, that will make them jointenants *(b)*.

But THE COURT were all of opinion, that the words in the will shew them to be tenants in common, for *equally to be divided* runs to the moieties.

So the judgment was affirmed.

Dyer, 25. 350. Moor, 594. 2. And. 17. 3. Lev. 373. Cro. Eliz. 443. 696. Cro. Car. 75. 1. Bulst. 113. 9. Mod. 9. 11. 27 10 Mod. 99. 398. 421. 442. 516. Cases T. T. 209. Gilb. E. R. 137. 1. Peer. Wms. 390. 518. 2. Peer. Wms. 308. 1. Vezey, 165. 3. Burr. 1881. 1895. 1. Wils. 341. 3. Bac. Abr. 198. Cowp. 660.

(a) King *v.* Rumball, Cro. Jac. 448. S. C. 1. Roll. Abr. 833. 2. Roll. Abr. 89. 3. Co. 39. 3. Bac. Abr. 196.—See the case of Armstrong *v.* Eldridge, 3. Brown's Cases in Chan. 215.

(b) Dyer, 350. Cro. Eliz. 163. 431. 2. Roll. Rep. 256. Yelv. 210. Stra. 117. 2. Atk. 304. 441.; and see the case of Tuckerman *v.* Jefferies, 12. Mod. 108. Holt, 370.

We

* Woodward's Case. Case 127.

THE statute of 23. *Hen.* 8. c. 9. prohibits a citation out of the diocese wherein the party dwells, except in certain cases therein mentioned, one whereof is, *viz.* "except for any spiritual "cause neglected to be done within the diocese, whereunto the "party shall be lawfully cited."

Church ornaments are a personal charge upon the inhabitants, and not upon those who live elsewhere, though they occupy lands in that parish.

One *Woodward* and others, who lived in the diocese of *Litchfield* and *Coventry*, but occupied lands in the diocese of *Peterborough*, were taxed by the parishioners, where they used those lands, for the bells of the church; and they refusing to pay this tax, a suit was commenced against them in the *Bishop of Peterborough's* Court; who thereupon suggested this matter, and prayed a prohibition, because they were not to be charged with this tax, it being only for church ornaments.

S. C. Comb. 132. S. C. Salk. 164. Godb. 134. 152. 154. 2. Roll. Abr. 291. Bulst. 20. 4. Mod. 148. 2. Lev. 186. Prec. Ch. 42. 8. Mod. 338. 10. Mod. 13.

And a prohibition was granted.

The reason given was, Because it is a personal charge to which the inhabitants only are liable, and not those who only occupy in that parish and live in another; but the repairing of the church is a real charge upon the land, let the owner live where he will.

12. Mod. 416. 2. Stra. 576. 3. Com. Dig. "Eglise" (G. 2.). 1. Ld. Ray. 59. 512. 2. Ld. Ray. 1408. 5. Mod. 389. Prec. Chan. 42. 8. Mod. 338. 1. Bac. Abr. 616.

TRINITY TERM,

The Fourth of James the Second,

IN

The King's Bench.

Friday, June 15th, 1688.

Sir Robert Wright, *Knt. Chief Justice.*
Sir Richard Holloway, *Knt.*
Sir Thomas Powell, *Knt.* } *Justices.*
Sir Richard Allibon, *Knt.*
Sir Thomas Powis, *Knt. Attorney General.*
Sir William Williams, *Knt. Solicitor General.*

Case 128.

* THE CASE OF THE SEVEN BISHOPS.

On a return to a *habeas corpus* to bring up persons committed on an *ex officio* information for a libel, the defendants may take objections to the return, although the *habeas corpus* was obtained by THE KING for the sole purpose of taking their *pleas.*

THE KING, having set forth "a declaration for liberty of "conscience," did, on the fourth day of *May* last, by order of council, enjoin that the same should be read twice in all churches, &c. and that the bishops should distribute it through their respective dioceses, that it might be read accordingly. THE ARCHBISHOP OF CANTERBURY, together with six other bishops, petitioned the king, setting forth that this declaration was founded upon a dispensing power, which had been declared illegal in parliament, and therefore they could not in honour or conscience make themselves parties to the distribution and publication of this declaration. They were thereupon summoned before the king in council; and, refusing there to give recognizance to appear before the court of king's bench, they were committed to THE TOWER by warrant of the Council-board.

S. C. 4. State Tr. 300.
5. State Tr. 749.
Dougl. 159.

THE ATTORNEY GENERAL moved for a *habeas corpus* returnable *immediatè*; and the same morning in which that motion was made, *Sir Edward Hales*, Lieutenant of THE TOWER, returned the same, and they were all brought into the court.

A return to a warrant stating the commitment to have been by such persons, mentioning their names, and describing them "lords of "his majesty's "most honourable privy "council," is sufficient.

* The substance of the return was, that they were committed to his custody by warrant under the hands and seals of the LORD CHANCELLOR JEFFERIES, and also naming more of the lords of the privy-council, *dominos concilii*, "for contriving, making, and "publishing a seditious libel against the king, &c." It was prayed that the return might be filed, and that the information, which was then exhibited against them for this crime, might be read, and that they might all plead *instanter*.

PEMBERTON, *Serjeant*, MR. FINCH, and MR. POLLEXFEN, opposed the reading of it, and moved that THE BISHOPS might be discharged, because they were not legally before the Court; for it appears upon the return that there is no lawful cause of commitment, and that for two reasons:

9. Mod. 46. 52. 10. Mod. 334. 12. Mod. 74. 108. 113. 641. Fitzg. 266. 1. Stra. 3. 1. Ld. Ray. 65. 778. 2. Ld Ray. 851. 978. 1030. 1303. Dougl. 158. 2. Term Rep. 455.

FIRST, Because the persons committing had not any authority so to do; for upon the return it appears that they were committed by several lords *of* the council, whereas it should have been by so many lords *in* council, or *by order of* council.

ALLIBON, *Justice*, replied, that when a commitment was made by the Lord Chief Justice of this court his name is to the warrant, but not his office; it is not said "*committitur per Capitalem Jus-"titiarium Angliæ, &c.*" for he is known to be so; and why should not a commitment by such persons *dominos concilii* be as good as a commitment by SIR ROBERT WRIGHT, *Capitalem Justitiarium?* It was enough for the officer to return his warrant, and when that is done the Court will presume that the commitment was by the power which the lords in council had, and not by that power which they had not.

MR. FINCH answered to this, that the Lord Chief Justice always carries an authority with him to commit wherever he goes in *England*; but the lords of the privy council have not so large a power; for though they are lords of the council always, yet they do not always act in council.

* Then the statute of 17. *Car.* 1. c. 10. was read, in which there is mention made of a commitment by the lords of the privy council, &c.

But it was answered, that that statute was to relieve against illegal commitments, and those enumerated in that act were such only, and none else.

On an information *ex officio* filed against a bishop or other peer, for any matter amounting to *a breach of the peace*, the first process may be by *capias*, and not, as in other cases, by *distringas*. Post. 265.—1. Co. 26. Co. Ent. 371. 1. And. 48. Rastal, 599. Finch, 352. 2. Hale, 194.

SECONDLY, They ought not to be committed for this fact, which is only a misdemeanor. THE BISHOPS are PEERS, and therefore the process ought to be *a summons*, by way of *subpæna*, out of THE CROWN OFFICE, and not to commit them the first time. If a man come in voluntarily, he cannot be charged with an

information;

information; neither can a person who is found in court by any process be so charged if it be illegal, as if a peer be committed by *capias*. THE CASE OF THE SEVEN BISHOPS.

And it was strongly insisted, that peers of the realm cannot be committed at the first instance for *a misdemeanor* before judgment; and that no precedent can be shewed where a peer has been brought in by *capias*, which is the first process, for a bare misdemeanor. The constant proceedings in THE STAR CHAMBER upon such informations were, *viz.* first THE LORD CHANCELLOR sent *a letter* to the person; then, if he did not appear, *an attachment* went forth *(a)*.

THE KING'S COUNSEL answered, that a peer may be committed for the breach of the peace *(b)*, for which sureties are to be given; and can there be any greater breach of the peace than *a libel* against the king and government(*c*)? It is certainly such a breach of the peace for which sureties ought to be demanded; for where there is any seditious act, there must be a breach of the peace, and if sureties are not given, then the person must be committed.

The objections were over-ruled by *three Judges (d)*.

A criminal information lies for *conspiring* to defeat the effect of a royal proclamation, by maliciously framing and publishing a libellous petition against it.

THE INFORMATION was then read, which in substance was (*e*), That the king, by virtue of his prerogative, did, on the fourth day of *April*, in the third year of his reign, publish his gracious declaration for liberty of conscience, which was set forth *in hæc verba*. That afterwards, on the 27th of *April*, in the fourth year of his reign, the king did publish another declaration, reciting the former, in which he expressed his care that the indulgence by him granted might be preserved, &c. That he caused this last declaration to be printed; and to manifest his favour more signally towards his subjects, on the fourth day of *May* 1688, it was ordered in council that this declaration, dated the 27th day of *April* last, be read on two several days in all churches and chapels in the kingdom, and that the bishops cause the same to be distributed through their several dioceses, &c. That after the making of the said order, &c. THE BISHOPS (naming them) did *consult and conspire* amongst themselves to lessen the authority and prerogative of the king, and to elude the said order; and in further prosecution of their said conspiracy, they, with force and arms, did on the 18th day of *May*, *&c.* * unlawfully, maliciously, &c. frame, compose, and write a libel of the king, subscribed by them, which they caused to be published under the pretence of a petition. Then the petition was set forth *in hæc verba*, " *in contemptum dicti domini regis, &c.*" * [215]

[b] Crompton's Jurisdiction of Courts, [...]r, 315. 4. Inst. 25. Reg. 287.
[...] See the case of Sir Baptist Hicks, 215.

(*c*) See Rex. *v.* Wilkes, 2. Wilf. 151, to 160. that a libel is not a Breach of the Peace; but only tends to a breach of the peace.

(*d*) The three Judges were WRIGHT, *Chief Justice*, ALLIBON and HOLLOWAY, *Justices*, against POWELL, *Justice*. See 2. Wilf. 159.

(*e*) See the information *verbatim*, 4. St. Trials, 317.

To an information *ex officio*, if the defendant be brought into court in *custody*, or appear upon *recognizance*, he must plead *instanter*.

THE KING'S COUNSEL moved that the defendants might plead *instanter*; for so, they said, is the course of the Court when a man is brought thither *in custody*, or appears upon *recognizance*.

2. Show. 56.
2. Salk. 367.
514. *contra*.
12. Mod. 372.
3. Com. Dig. 514.
5. Com. Dig. 93.

But THE COUNSEL *on the other side* prayed *an imparlance* and a copy of the information, and argued that the defendants ought not to plead *instanter*, because their plea ought to be put in writing, and that they ought to have time to consider what to plead; that it was impossible to make any defence when they did not know the accusation, and that the practice of the Court anciently was with them. It is true, when *a subpœna* is taken out, and the party does not appear, but is brought in by *capias*, he shall plead *instanter*; and the reason is, because he has given delay to the cause: so it is likewise in cases of *felony* or *treason*, but not to an information for *a misdemeanor*.

The clerk of the crown may certify the practice of the court.

THE CLERK OF THE CROWN then informed the Court, that it was the course to plead *instanter* in these following cases: *first*, when the person appears upon *a recognizance*, or in *propriâ personâ*; or, *secondly*, is a prisoner in custody upon any information for a misdemeanor where no process issued out to call him in.

On an information for a misdemeanor, the defendant is not intitled to a copy of the information.

As to the objection that the defendants cannot make any defence without a copy of the information, the usage is otherwise even in cases where a man's life is concerned (*a*); and what greater difficulty can there be to defend an accusation for a misdemeanor than a charge for high-treason? Certainly the defendants all know whether they are innocent or not.

(*a*) 1. Lev. 68. Moor, 666. 1. Show. 131 2. Hale, 236. 2. Hawk. P. C. ch. 39. f. 13.

If an imparlance to an information be refused on *motion*, the Court may reject a plea calculated to bring the same question again before the Court.

These points being over-ruled by the Court, THE ARCHBISHOP offered a plea in writing, the substance of which was, that they (naming all the defendants) were peers of parliament, and ought not to be compelled to answer this misdemeanor immediately, but they ought to appear upon due process of law, and upon their appearance to have a copy of the information, and afterwards to imparl; and because they were not brought in by process, they pray the judgment of the Court.

This plea was offered to the end that what was denied before upon a motion might be settled by the opinion of the Court, but it was over-ruled (*a*).

*[216] * Then they pleaded severally "*not guilty*," and were tried at THE BAR a fortnight afterwards by a *Middlesex* jury, and acquitted.

(*a*) See Fitzharris's Case Vol. 3. of Mr. Hargrave's edition of State Trials, page 241. to 261. S. C. 1. Vent. 354. and 2. Show. 163. *notis*.

TRINITY

TRINITY TERM,

The Fourth of James the Second,

IN

The Common Pleas.

Sir Edward Herbert, *Knt. Chief Juſtice.*

Sir Edward Lutwich, *Knt.*
Sir Thomas Street, *Knt.* } *Juſtices.*
Sir John Powell, *Knt.*

Sir Thomas Powis, *Knt. Attorney General.*

Sir William Williams, *Knt. Solicitor General.*

Anonymous. — Caſe 125.

AN ACTION OF DEBT was brought upon a bond againſt the defendant; in which bond the ſaid *A. B.* the elder and *A. B.* the younger were jointly and ſeverally bound in the penal ſum of one thouſand pounds, CONDITIONED, "that if the "above bounden *A. B.* (omitting the word "younger") do and "ſhall forbear knowingly and wittingly to come to, or write let- "ters unto *C.* the wife of *D.* that then the obligation to be void." The defendant pleaded, that he did not come to, or write letters to the ſaid *C.* knowingly, &c. The plaintiff replied, that he exhibited an information againſt *A. B.* the younger (ſhewing in what Term); and that it was agreed between them, that in conſideration he would forbear to proſecute the ſame, the ſaid *A. B.* the elder, together with *A. B.* the younger, ſhould become bound to the plaintiff in one thouſand pounds, that the ſaid *A. B.* the younger ſhould not knowingly or wittingly come into the company, &c. then ſets forth the bond and the condition thereof at large, and avers that *A. B.* in the condition mentioned is *A. B.* the younger; and farther that the ſaid *A. B.* the younger did afterwards knowingly come into the company, &c. The defendant rejoined and ſaid, that the plaintiff ought not to aver that the aforeſaid *A. B.* the younger is the perſon in the condition of the ſaid bond, &c. The plaintiff demurred.

If *A. B. ſenior* and *A. B. junior* be jointly and ſeverally bound in a bond, but, in reciting their names in the condition, the word "*younger*" be omitted, the obligee, in debt on the bond, is not *eſtopped* to aver, that the ſaid *A. B. junior* is *the perſon* named in the condition; for it is conſiſtent with the record.

1. Ro. Ab. 862.
6. Mod. 312.
1. Term Rep. 701.
2. Term Rep. 171.

The

ANONYMOUS. The queſtion was, Whether the plaintiff was eſtopped by the words in the condition to make ſuch an averment?

It was argued *for the plaintiff*, that he might make ſuch an averment, which is to reduce a thing to a certainty which was very uncertain before, if it be not repugnant in itſelf; nay ſometimes an averment does reduce contradictory things to a certainty. It is plain that *A. B.* the younger is bound in this bond; the objection is, that *A. B.* the elder being of the name and being likewiſe bound, [217] that the condition might refer to either. * It is agreed there are many caſes where a man ſhall be eſtopped to aver againſt a record; but this averment is not contradictory to anything in the record; for it appears by the pleadings that the information was proſecuted againſt *A. B.* the younger, and therefore he muſt be intended to be bound not to come to the ſaid *C.* knowingly, &c. If an eſtate ſhould be deviſed to *A.* and the name of the teſtator omitted in the will, yet the deviſe is good by an averment of the name, and by proof that it was his intention to give it him by his will *(a)*. So if the plaintiff ſhould claim a title under the grant of ſuch a perſon *Knight*, and the jury find he was an *Eſquire*, but that the *Knight* and the *Eſquire* are both the ſame perſon, this is a good declaration *(b)*. It is uſual to make an allegation even againſt the expreſs words of a condition to ſhew the truth of an agreement; as where debt was brought upon a bond of a hundred pounds, conditioned to pay fifty pounds within ſix months, the defendant pleaded the ſtatute of uſury; the plaintiff replied, that he lent the money for a year, and alledged that by the miſtake of the ſcrivener the bond was made payable in ſix months; the defendant rejoined that it was lent for ſix months only: and upon a demurrer this was adjudged to be a good allegation *(c)*, though it was againſt the very words of the condition; which is a ſtronger caſe than this at the bar, becauſe the averment conſiſts with the condition of the bond *(d)*. If a man ſhould levy a fine and declare the uſes thereof to his ſon *William*, and he has two ſons of that name, and then an averment is made that he intended to declare the uſes to his youngeſt ſon of that name; this averment out of the fine has been adjudged good *(e)* for the ſame reaſon given already, which is, becauſe it ſtands with the words thereof, and it is a good iſſue to be tried. It cannot be objected that the bond is illegal, being entered into for the not proſecuting of an information, becauſe a *nolle proſequi* was entered as to that matter, ſo it is the act of the Court. Laſtly, It was ſaid, that every *eſtoppel* muſt be certain to every intent *(f)*; which cannot be in this caſe, for by the words of this condition it is uncertain which of the obligors ſhall be intended.

E contra, It was argued, that an eſtoppel is as well intended by law, as expreſſed by words; and that if an averment can be taken,

(a) 2. Leon. 35. 2. Vern. 624. Prec. Chan. 229.

(b) Litt. Rep. 181. 223.

(c) Neviſon v. Whitley, Cro. Car. 501. See alſo Fitzg. 74. 76.

(d) See Hinton v. Roffey, ante, 35.

(e) 4. Co. 71. 8. Co. 155. Dyer, 146.

(f) See Rex v. Horne, Cowp. 682, a deſcription of the *three kinds* of *certainties*; and Douglas, 159. that certainty to a certain intent in every particular is neceſſary in *eſtoppels*.

yet

ANONYMOUS.

yet this is not well, because the plaintiff hath absolutely averred that *A. B.* in the condition is *A. B.* the younger; he * should have said, that *A. B.* in the condition is intended *A. B.* the younger, which might have been traversed, and issue taken thereon.

No judgment was given, for this case was ended by compromise.

Hoil *against* Clark.

Case 130.

A will *revoking* all former wills, though not signed by the testator in the presence of the three witnesses, is sufficient to revoke a former will; for that clause of the statute 29. Car. 2. c. 3. which requires that the testator should sign in the presence of the witnesses, only refers to the last member, "*or other* "*writing*," and not to the first, "*other will or* "*codicil.*" Ante, 203. Post. 259.

THIS was a special verdict in ejectment for lands in *Wetherfield* in the county of *Essex*, upon the demise of *Abigail Pheasant*.

The jury find that one *John Clark* was seised in fee of the lands in question, who by his last will in writing, bearing date the fourteenth day of *September* in the year 1666, devised the same to *Benjamin Clark* for life; so to his first and second sons, &c. in tail male; and for default of such issue, then to his two sisters for life, remainder over, &c. This will was attested by *one witness* only. They find that the said *John Clark* made *another will*, dated the sixth day of *February* 1679, which was thirteen years after the making of his first will, and that by this last will he revoked all former wills and testaments by him made. They find an indorsement on this will, written by the testator himself in these words: "My will and "testament dated the 6th of *February* 1679, and then published "by me in the presence of three witnesses." They find that this last will was so published and attested by *three witnesses* in his presence, but that it was not signed by the testator in their presence *(a)*. They find that *Benjamin Clark* entered, and devised the lands to *Mary Micklethwaite*, who made a lease thereof to the plaintiff for three years, upon whom the defendant entered.

This case was argued at THE BAR, and in this Term at THE BENCH *seriatim*.

3. Lev. 1. Salk. 608. 68. 2. Vern. 741. 2. Esp. Dig. 187. 10. Mod. 6. 467. 520. Cowp. 92. 5. Brown's Cas. Par. 45. 7. Brown's Cas. Par. 344. 1. Peer. Wms. 239. Com. Rep. 197. Cowp. 52. 87. 92. 814.

The single question was, Whether this last will, not being duly executed according to the statute 29. *Car.* 2. c. 3. is a revocation of the first will, or not?

It was admitted by all, that it was a good will to pass the *personal estate*, but as to the point of revocation THE COURT was divided.

LUTWICH, *Justice*, argued, that it was not a revocation: he agreed that if the last will has any respect to the first, it must be as a * revocation, or not at all; which revocation must depend upon the construction and exposition of the sixth paragraph in the statute of frauds, &c. the words whereof are, "That no devise in writing "of lands, &c. nor any clause thereof, shall be revoked otherwise "than by some other will or codicil in writing, or other writing "declaring the same, or by burning, cancelling, tearing, or ob-

*[219]

(a) See 2. Vezey, 454. Dougl. 244. *notis*.

HOLT *against* CLARK.

" literating the ſame by the teſtator himſelf or in his preſence, and " by his direction or conſent. But all deviſes of lands, &c. ſhall " remain and continue in force until burnt, cancelled, torn, or " obliterated, by the teſtator or his direction in manner afore- " ſaid, or unleſs the ſame be altered by ſome other will or codicil " in writing, or other writing of the deviſor, *ſigned in the pre- " ſence of three witneſſes*, declaring the ſame." So that the queſ- tion will be, Whether a will which revokes a former will ought to be ſigned by the teſtator in the preſence of three witneſſes? It is clear that a will by which lands are deviſed ought to be ſo ſigned, and why ſhould not a will which revokes another will have the ſame formality? The ſtatute ſeems to be plain that it ſhould, for it ſays that a will ſhall not be revoked but by ſome will or codicil in writing, " or *other writing* of the deviſor, ſigned by him in the " preſence of three or four witneſſes declaring the ſame:" which laſt clauſe is an entire ſentence in the disjunctive, and appoints that the writing which revokes a will muſt be ſigned in the preſence of three witneſſes, &c. Before the making of this act it was ſuffi- cient that the teſtator gave directions to make his will, though he did never ſee it when made; which miſchief is now remedied, not in writing the will, but that the party himſelf ſhould ſign it in the preſence of three witneſſes; and this not being ſo ſigned, but only publiſhed by the teſtator, in their preſence, it is therefore no good revocation.

STREET, *Juſtice*, was of a contrary opinion, that this was a good revocation: that the words in the fifth paragraph of this ſta- tute which altered the law were, " That all deviſes of lands, &c. " ſhall be in writing, and ſigned by the party ſo deviſing the ſame, " or by ſome other perſon in his preſence, and by his expreſs " directions, and ſhall be atteſted and ſubſcribed in the *preſence of " the ſaid deviſor, by three or four credible witneſſes*." In which paragraph there are two parts:—FIRST, The act of the deviſor, which is to ſign the will, but not a word that he ſhall ſubſcribe

* [220] his name in the preſence of three witneſſes.—* SECONDLY, The act of the witneſſes, *viz.* that they ſhall atteſt and ſubſcribe the will in the preſence of the deviſor, or elſe the will to be void. But the ſixth paragraph is penned after another manner, as to the revocation of a will, which muſt be by ſome codicil in writing, or other writing declaring the ſame, ſigned in the preſence of three witneſſes. Now here is a writing declaring that it ſhall be revoked, not expreſly, but by implication; and though that clauſe in the disjunctive which ſays that the revocation muſt be by ſome *writing* of the deviſor, ſigned in the preſence of three witneſſes, &c. yet in the ſame paragraph it is ſaid, that it may be revoked by a codicil or will in writing; and therefore an expoſition ought to be made upon the whole paragraph, that the intention of the law may more fully appear. Such a conſtruction has been made upon a whole ſentence, where part thereof was in the disjunctive; as for inſtance, A man was poſſeſſed of a leaſe by diſſeiſin, who aſſigned it to another, and covenanted that at the time of the aſſignment it was a good;

Gainsford *v.* Griffin, Sid. 228 S. C. 1. Saund. 58.

a good, true, and indefeasible lease, and that the plaintiff should enjoy it without interruption of the disseisor, or any claiming under him; in this case disseisee re-entered; and though the covenant was in the disjunctive to defend the assignee from the disseisor, or any claiming under him, yet he having undertaken for quiet enjoyment, and it being an indefeasible lease, it was adjudged that an exposition ought to be made upon the whole sentence; and so the plaintiff had judgment.

Hore *against* Clerk.

Post. 252. 10. Mod. 384.

Herbert, *Chief Justice*, was of the same opinion with Street, *Justice* (*a*).

(*a*) The law of this case is said to have been confirmed by *Lord Hardwicke*, in the case of *Ellis v. Smith*. A man makes a will revoking a former will; it was attested by three witnesses in his presence, according to the *devising clause* of 29. *Car.* 2. c. 3.; but it was not signed by him in their presence, according to the *revoking clause* in the said statute; but after he had signed it, on the witnesses being called into the room, he acknowledged it to be his handwriting and seal, pointing with his finger to the will. One question was, Whether it was well executed as a revocation? And by Hardwicke, *Chancellor*, the words "signed in the presence of three "witnesses" refer to the next preceding words "other writing" only, and not to "a will or codicil;" and so it was determined in the case of Hoil *v.* Clark. Richardson on Wills, 297. 5. Bac. Abr. 505. And by Gilbert, *C. B.* a revocation may be either by *a subsequent will* sufficiently effectual to alter the disposition of the former will, or by *a writing* declaring it to be revoked. Gilbert's Dev. 107. 3. Salk. 396. See the case of Grayson *v.* Atkinson, 1. Wils. 333. 2. Vezey, 454.; and Ellis *v.* Smith, Michaelmas Term, 27. *Geo.* 2.; Carter *v.* Price, Douglas, 244. But see the case of Eccleston *v.* Speke, that a will not attested, according to the devising clause, in the presence of the testator, nor *inconsistent* with the devises in a former will, cannot operate as a revocation of such former will; for that for this purpose it must be a good *will in all circumstances*. Post. 259. 1. Show. 89.—See also the case of Onyons *v.* Tyer, 1. Peer. Wms. 343. Prec. Ch. 459. and Powel on Devises, 468.

TRINITY TERM,

The Fourth of James the Second,

IN

The King's Bench.

Sir Robert Wright, *Knt. Chief Justice.*
Sir Richard Holloway, *Knt.*
Sir Thomas Powel, *Knt.* } *Justices.*
Sir Richard Allibon, *Knt.*
Sir Thomas Powis, *Knt. Attorney General.*
Sir William Williams, *Knt. Solicitor General.*

* Rex *against* Grimes and Thompson. Case 131.

If two be indicted for a *conspiracy*, the acquittal of one is the acquittal of the other.

THE DEFENDANTS were indicted for being common pawn-brokers, and that *Grimes* had unlawfully obtained goods of the *Countess of*, &c. and that he, together with one *Thompson*, *per confederationem et astutiam*, did detain the said goods until *the Countess* had paid him twelve guineas. *Thompson* was acquitted, and *Grimes* was found guilty; which must be of the first part of the indictment only, for it could not be *per confederationem* with *Thompson*.

8. Mod. 242. 295. 321. 2. Ld. Ray. 1162.

It was therefore moved in arrest of judgment, that to obtain goods *unlawfully*, was only a private injury, for which the party ought not to be indicted.

*To which it was answered, that a plain *fraud* was laid in this indictment, which was sufficient to maintain it; and that though one was acquitted, yet the jury had found the other guilty of the whole. * [221]

But THE COURT were of opinion, that the acquittal of one is the acquittal of both upon this indictment.—And therefore it was quashed.

Case 132.

King *against* Dilliston.

Hilary Term, 2. & 3. Jac. 1. Roll 494.

A custom that the person to whose use a copyhold estate is surrendered shall come in and be admitted after three proclamations, or otherwise that his land shall be FORFEITED, is good. But this custom shall not bind *an infant*; and therefore if a surrender be made in fee, and the surrenderee die before the next court, the estate is not forfeited by the infant heir of the surrenderee not coming in after three proclamations.— *Sed quære*, If it may not be seized *quousque*?

A WRIT OF ERROR was brought to reverse a judgment in ejectment, given in the common pleas, for one messuage and twenty acres of land held of the manor of *Swafling*.

There was a special verdict found, the substance of which was, *viz.* That the land in question was copyhold, held of the said manor of *Swafling* in the county of *Suffolk*; and that *Henry Warner* and *Elizabeth* his wife, in right of the said *Elizabeth*, were seised thereof for life; remainder to *John Ballat* in fee; that the custom of the said manor was, that "if any customary tenant "doth surrender his estate out of court, that such surrender shall "be presented at the next court of the said manor, and public "proclamation shall be made, three court days afterwards, for the "party, to whose use the surrender was made, to come and be ad-"mitted tenant; and if he refuse, then after three proclamations "made in each of the said courts, the steward of the said manor issueth "forth a precept to the bailiff thereof to seize the copyhold as for-"feited." They find that *Henry Warner* and his wife, and *John Ballat*, made this surrender out of court to the use of *Robert Freeman* and his heirs, who died before the next court, and that *John Freeman*, an infant, was his son and heir; that, after the said surrender, three proclamations were made at three several courts held for the said manor, but that the said *John Freeman* did not come to be admitted tenant; that thereupon the steward of the said manor made a precept to the bailiff, who seized the lands in question as forfeited to the lady, who entered and made a lease to the plaintiff, upon whom the defendant re-entered.

* [222]

S.C. 1. Lut. 765. S. C. Salk. 386. S. C. 1. Show. 31. 83. S.C. Comb. 118. S. C. Carth. 41. S.C. 2. Dan. 438. 8. Co. 99, 100. Plowd. 372. 1. Lev. 63. 1. Ro. Ab. 568. Noy. 42. 1. Leon. 100. 3. Leon. 221. Cro. Jac. 226. 2. Vern. 343. 467. 537. 561 664. Comy. 71. 84. 4. Mod. 18. 53. 63. 73. 94. 2. Burr. 206. 3. Ro. Ab. 129. 3. T. Rep. 162.

The single question upon this special verdict was, Whether this was *a forfeiture*, and so a good seizure to bind the right of an infant?

* IT WAS ARGUED *for the plaintiff* in the action, that it was a good seizure and a forfeiture till the infant should come of age; for as a copyhold is established by custom, so likewise it is custom which obliges the infant to the conditions thereof; and therefore where one under age has an estate upon a condition to be performed by him, and that condition is broken during his minority, the estate is lost for ever (*a*). In this case the custom obliges the heir to be admitted, that the lord may be intitled to a fine; which if he should lose because his tenant is an infant, then that privilege of infancy works a wrong, which the law will not permit (*b*). It is true, an infant shall not be prejudiced by the laches of another, but shall be answerable for himself; and therefore if he is tenant of lands and the rent should be unpaid for two years, and no distress can be found, *a cessavit* lies against him, and the lord shall recover the land, be-

(*a*) 8. Co. 44. Whittingham's Case, Latch. 199. Jones, 157. Wms. 151. Stra. 447. 654. 1042. 1070. 5 and the 9. *Geo.* 1. c. 29. post. *in notis.*

(*b*) See Prec. Chan. 568. 3. Peer.

cause

cause of the non-performance which arises by his own default (*a*). So if one under age be a keeper of a gaol and suffer a prisoner to escape out of execution, an action of debt will lie against him upon the statute of *Westminster the Second (b)*. It was agreed that such a custom and non-claim will not foreclose an heir who is an infant and beyond sea at the time of his ancestor's death, though he is bound by the custom to claim it at the next court; but that if he will come over and tender himself, though after a seizure, he shall be admitted; and so shall the person in this case if, after his minority, he offer himself to be admitted (*c*). But it cannot be denied, but that the lord may seize when the heir is beyond sea, till he return and tender himself to be admitted; and by the same reason he may also seize in this case during the minority (*d*). A temporary forfeiture is no new thing in the law; for if a *feme covert* be a copyholder, and her husband make a lease for years without license of the lord, it is a forfeiture, and shall bind her during the coverture (*e*). So the law is, that the lord may seize the land till a fine is paid, for it is a reasonable custom so to do (*f*). It has been held a good custom for the lord to assign a person to take the profits of a copyhold estate descended to the infant during his minority, without rendering an account when he came of age (*g*). * So that all that is to be done in this case is to enforce the infant to be admitted, that the lord may be entitled to a fine: the inheritance is not bound, but the land is only seized *quousque*.

KING against DILLISTON.
1. Peer. Wms. 718.
1. Ld Ray 301. 10. Mod. 245. 12. Mod. 123.
* [223]

E CONTRA it was argued, That here is a general seizure, which cannot extend to an infant, for he is not bound in a *writ of right*, much less in an inferior court, after three proclamations; but if this had been a temporary seizure the jury ought to have found it so, which is not done; that there are many authorities in the Books which affirm that an infant is not obliged to be admitted during his nonage, or to tender the fine in order to an admittance; and that the law was settled in this point; and therefore, without any further argument, he prayed judgment for the defendant.

1. Leon. 100. 3. Leon. 221. 10. Mod. 67. 85. 139.

Afterwards, in *Hilary Term* the First of *William and Mary*, this case was argued *seriatim* at the bench, THREE JUDGES being, of a contrary opinion to THE CHIEF JUSTICE, for the affirming of the judgment.

EYRE, *Justice*, premised two things.—FIRST, That he could not intend but that this verdict had found an absolute forfeiture, the jury having no way qualified it as to a certain time, and therefore he would give a judgment upon the whole record.—SECONDLY, He agreed that a feoffment of an infant was no forfeiture at the common law, and that as a particular custom may bind an infant

(*a*) Co. Lit. 380. 1. Roll. Abr. 138. Plowd. 364. 6. Co. 4. Ray. 118. 8. Mod. 193. 247. 304.

(*b*) 2. Inst. 382. See also Plowd. 379. 381. 9. Co. 48.

(*c*) Sir Richard Letchford's Case, 8. Co. 100.

(*d*) Underhill *v.* Kelsey, Cro. Jac. 226.

(*e*) Saverne *v.* Smith, Cro. Car. 7.—See also Gilbert's Tenures, 243. 2. Com. Dig. 525.

(*f*) Jackman *v.* Hoddesden, Cro. Eliz. 351.—See also Gilb. Ten. 234. Co. Lit. 59. b.

(*g*) 1. Leon. 266. 2. Leon 239.

for

King against Dillion for a time, so it may bar him for ever; but, Whether this custom, as it is found in general words, shall bind an infant after three proclamations? is now the question, he not coming then to be admitted.

And he held that it shall not, and for these reasons:

First, The right of infants is much favoured in the law, and their laches shall not be prejudicial to them as to entry or claim, upon a presumption that they understand not their right; and there-

1. Stra. 94. 168. 604. 2. Stra. 937 fore in a *cessavit per biennium*, which is a remedy given by the statute of *Westminster the Second*, and which extends to infants who have not the land by descent (a); for if *a cesser* be in that case the infant shall have his age, because the law intends that he does not

2. Vern 342 3. Peer. Wms 309. 352. 3' know what arrears to tender; it is admitted that if an infant do not present to a church within six months, or do not appear within a year, that his right is bound; but this is because the law is

* [224] more tender of the * church, and the life of a man, than of the privileges of infancy. So if an office of parkship be given or descends to an infant, if the condition in law annexed to such an office (which is skill) be not observed, the office is forfeited. But that a proclamation in a base court should bind an infant, when he is not within the reason of the custom, is not agreeable either to law or reason.

Ld. Ray. 777. Secondly, All customs are to be taken strictly when they go to the destruction of an estate; and therefore a custom was, that if a copyholder in fee surrender out of court, and the surrenderee do not come in after three proclamations, the lord may seize it. A copyholder in fee surrendered to another for life, the remainder over in fee; if the tenant for life will not come in, he in the remainder shall not be barred, for the custom shall be intended to extend only to those in possession (b). But the infant in this case is not within the letter of the custom, for it is found that the surrender was made to one *Freeman*, who died before the next court day, and that *John Freeman* the infant was his son and heir; so they have found a title in him; for the word "heir" is not here a word of purchase, but of limitation.

Jones, 157 Noy, 92. Thirdly, Infants are not bound by other customs like this, as a custom that every copyholder who makes a lease of his land shall forfeit it; but this does not conclude an infant.

Fourthly, There is not any necessity to construe an infant to be within this custom; for it is not found that the lord was to have a fine upon admittance; and it is no consequence to say that the lord shall have a fine, because usually fines are taken upon ad-

Leon. Leon. mittances; for an infant may be admitted to a copyhold, but not be bound to tender his fine at any time during his non-age.

Gregory, *Justice*, was of the same opinion, which he chiefly grounded upon *Sir Richard Litchford's Case*, between which and the

(a) Cap. 32. Co Lit 380. 2. Inst. 401. 1. Stra. 94 168. 604. 2. Stra. 937. 3. Bac. Abr. 128. 49. Cro. Eliz. 598. 879. Yelv. 1; Noy, 42. Ray. 444. Cro. Jac. 80; 2. Wils. 13. 16. 1. Com. Dig. "Copyhold" (M. 5.).

(b) 1. Roll. Abr. 509. 568. Moor,

the case at the bar, he said, there was no material difference; only in that case the heir was beyond sea, and in this at the bar he was an infant. It is very true, that the Books (*a*) mention a *seizure quousque*; it is so said by WILLIAMS, *Justice*, in CROKE (*b*); but he gives no reason for it, it is only an opinion *obiter*; but it is clear by many authorities that infants may be bound by acts of necessity, and so they may by a custom. KING against DILLISTONE

* DOLBEN, *Justice*, of the same opinion, which he said was agreeable to the reason of the law in parallel cases: an infant is privileged in a fine, for he is excepted by the statute (*c*), because he knows not how to make his claim. He said, this was likewise agreeable to the custom of twenty-six manors of which he was formerly steward; for in such cases he always marked the court-roll, *nulla proclamatio quia infans*. It cannot be a forfeiture *quousque*, because an infant is wholly exempted by the custom, and therefore it is no forfeiture at all. It is an objection of no moment to say that the lord by this means will lose his fine, and that he has no remedy to make the infant when of age to be admitted; for no fine is due to him before admittance. But this objection will be of less weight, if the loss of the infant be compared to that of the lord, who loses only the interest of a fine before admittance; and shall this infant, who is now but three years of age, lose the profits of his estate for eighteen years? But there may be a way found out that neither may lose; for if it should be that when the infant comes of age his estate should be then forfeited, if he do not tender himself to be admitted after three proclamations, now upon his admittance the lord may set a reasonable fine, having respect to the length of time in which it was detained from him. *Stowel's Case* (*d*) was no more but this, *viz.* A disseisor levied a fine with proclamations, and lived three years, his heir being under age, and the five years incurred after the said heir came of age, and then he entered within a year, and his entry was adjudged unlawful. But that will not concern this case, because it was a judgment upon the statute of 4. *Hen.* 7. c. 24.; for the five years being once attached and begun in the life of his ancestor, shall incur and go on, and bind the infant, if he do not pursue his claim within that time after he comes of age; but it is to be observed, that my *Lord Dyer* in the argument of that case said nothing of a *seizure quousque*. * [225]

HOLT, *Chief Justice*, was of a contrary opinion from the other three Justices, and that the judgment ought to be reversed; because until the infant is admitted the estate remains in the surrenderer,

(*a*) Latch. 199. Godb. 364. Jones, 391. Dyer, 104.

(*b*) Underhill *v.* Kelsey, Cro. Jac. 226. The question was, Whether the heir being beyond sea would excuse the forfeiture for his not appearing at the next court after the death of his ancestor, according to the custom? And WILLIAMS, *Justice*, said that it would; for that being beyond sea, it was not in his power to return when he would, and the law will not compel him to impossibilities; and the lord is not at any mischief, for he may *seize in the interim*, and take the *mesne profits*, and shall not be responsible for them.—But as to this see the 9. *Geo.* 1. c. 29. s. 5.

(*c*) 4. *Hen.* 7. c. 24.

(*d*) Pl. Com. 356.

King against Dillaton.

*[226]

Yelv. 145. 8. Mod. 352. 9. Mod. 75. 10. Mod. 402. 11. Mod. 57. 75. 12. Mod. 297. 1. Vern. 132. Gilb. E. R. 8. 1. Stra. 487. 1. Ld. Ray. 76. 2. Ld. Ray. 1145. 1. Peer. Wms. 76. 180. 2. Vern. 561.

deror, and without an admittance he cannot enter but by a special custom to warrant it; and for this reason it is that the surrenderor shall have an action of trespass against any * person who enters, because he shall be intended still in possession till the admittance of another. If so, then infancy cannot protect an estate to which the infant has no title till admittance; for till then he has neither *jus in re* nor *jus ad rem* (a). This is a condition annexed to the estate to be performed by the infant, by which he is bound notwithstanding his non-age, otherwise his estate is forfeited. The custom which obliges him to be admitted, is to entitle the lord of the manor to a fine to which he has a right. Now infancy was never yet extended to endanger that remedy which men have to recover their rights; it has been often so far extended as to delay such a remedy, but never to destroy it; for if the infant should die, the lord loses the fine, and then another person is to be admitted; but he cannot increase the fine upon him who is a stranger, for the neglect of the infant. It is true, where an infant has a right it shall be preserved, though a fine be levied and the five years pass (b); but in this case he has no right before admittance. If a *feme covert* be an heir to a copyhold estate, where the like custom is, and the husband after three proclamations will not come and be admitted, it is a forfeiture during the coverture (c). Now the reason in the cases of coverture and infancy is the same; for if there shall be a seizure during the time the woman is covert, Why not during the infancy? As to *Sir Richard Letchford's Case* (d), the heir was beyond sea, but when he came into *England* he desired to be admitted; but this infant never yet desired to be admitted; he stands upon his privilege of infancy.

But upon the opinion of THE OTHER THREE JUSTICES, the judgment was affirmed that the custom does not bind the infant (e).

(a) See the case of Ford v. Hoskins, Cro. Jac. 368. S. C. 2. Bulst. 336. S. C. 1. Roll. Abr. 108. S. C. Moor, 841. Yelv. 16.

(b) Bridg. 83. Yelv. 144. Poph. 127.

(c) 2. Roll. Rep. 344. 1. Roll. Abr. 509. Cro. Eliz. 149.

(d) 8. Co. 99. Cro. Jac. 226. Godb. 258.

(e) By 9. *Geo* 1. c. 29. "Where any "person, being an *infant* or *feme covert*, "shall be intitled by *descent* or *surrender* "*to the use of a last will* to be admitted "tenant of any copyhold estate, every "such *infant* or *feme covert* shall in "their proper persons, or by guardian "or attorney, come to and appear at "one of the three next courts of the "manor, and shall there tender and offer "themselves to the lord or his steward "to be admitted tenants to the estate so "surrendered, descended, or come to, "or to the use of every such *infant* or "*feme covert*; and in default of such "appearance, or of acceptance of such admittance, the lord or his steward "shall, after such three several courts "have been duly holden and proclamations therein regularly made, nominate and appoint, at any subsequent court of the manor, a guardian or attorney of such *infant* and *feme covert* for that purpose only, and by such guardian or attorney shall admit every such *infant* or *feme covert* according to such estates as they have in the manor; and may, upon every such admittance, impose and set such fine and fines as might have been legally imposed and set if such *infant* had been of full age, or such *feme covert* unmarried: and if such fines be not paid on the notice to be given, and demand to be made, as prescribed by the act, the lord may enter and hold the estate until the perception of the rents and profits "thereof have paid the fine and charges, "&c, &c. &c." And see the case of Doe on the Demise of Tarrant v. Hillier, 3. Term Rep. 162.

Carter

Carter *against* Downich.

Case 133.

Hilary Term, 3. & 4. Jac. 2. Roll 836.

A COVENANT to pay so much money to the plaintiff or his assigns as should be drawn upon the now defendant by a bill of exchange, &c. The breach was assigned in non-payment. The defendant pleaded, that the plaintiff *secundum legem mercatoriam* did assign the money to be paid to *A.* who assigned it to *B.* to whom he paid a hundred pounds, and tendered the rest drawn upon by bill of exchange, &c.

A *declaration* or *plea* on a bill of exchange need not state the custom of merchants specially; but it is sufficient to say, that the party, *according to the usage and custom of merchants,* indorsed the bill to *A.* who indorsed it to *B.* &c.; for *lex mercatoria* being part of the common law, the Judges will take notice of them *ex officio.*

* MR. POLLEXFEN, upon a *demurrer*, insisted, that this was not a good plea, because the defendant had not set forth the custom of merchants, without which all these assignments are void, of which custom the Court cannot take any judicial notice, but it must be pleaded; and it is not sufficient to say, that the assignment was made *secundum legem mercatoriam*, but it must be *secundum consuetudinem mercatoriam*; otherwise it is not good.

E CONTRA it was argued, That the custom of merchants is not a particular custom and local, but it is of an universal extent, and is a general law of the land *(a)*. The pleading it as it is here is good; for if an action be brought against an inn-keeper or common carrier, it is usual to declare *secundum legem et consuetudinem Angliæ*; for it is not a custom confined to a particular place, but it is such which is extensive to all the king's people. The word "*consuetudo*" might have been added, but it imports no more than "*lex*," for *custom* itself is *law*. If the custom of merchants had been left out, the defendant had then pursued his covenant; for if a man agree to pay money to such a person or his assigns, and he appoint the payment to another, a tender to that person is a good performance of the covenant *(b)*

S. C. 1. Show. 127. S. C. Carth. 83. Co. Lit. 182. 2. Inst. 404. Winch. 24. 2. Roll. Rep. 113. Hard. 486. Yelv. 135. Cro. Car. 302. Salk. 125. 3. Bac. Abr. 585. 614. 3. Burr. 1663.

But THE COURT were of opinion that this was not a good plea *(c)*.

8. Mod. 178. 11. Mod. 24. 92. 190. 12. Mod. 15. 37. 211. 480. 1. Stra. 128. 145. 690. 2. Ld. Ray. 918.

(a) Litt. 182.

(b) Co. Lit. 182.

(c) A writ of error was brought in the exchequer chamber, and after argument the judgment of the court of king's bench was reversed, S. C. 1. Show. 130.; the Judges being of opinion that they ought *ex officio* to take notice of the law of merchants, because it is part of the law of the land; and especially of this custom concerning bills of exchange, because it is the most general of all the customs of merchants. S. C. Carth. 83. See Co. Lit. 182. 2. Inst. 404. Yelv. 136. 4. Co. 76. Cro. Car. 301. Ld. Ray. 175. 281. 3. Bac. Abr. 585, 614. 3. Burr. 1663.

Case 134. Panton *against* the Earl of Bath.

A *variance* between a *scire facias* and a judgment in the court of OLIVER, *Protector of England*, and the dominions and territories thereof, by leaving out the word *territories*, is not material.

A SCIRE FACIAS to have execution of a judgment obtained in the court of OLIVER late PROTECTOR OF ENGLAND and the dominions and territories thereunto belonging; and in reciting the judgment it is said that it was obtained before OLIVER, *Protector of England* and the dominions thereunto belonging (leaving out the word *territories*.)

MR. POLLEXFEN, upon a *demurrer*, held this to be a *variance*, and like the case *(a)* where a writ of error was brought to remove a record in ejectment directed to the *Bishop of Durham*, setting forth that the action was between such parties, and brought before the said bishop and *seven* other persons (naming them); and

* [228] the record removed was an ejectment before the bishop and *eight* * others, so that it could not be the same record which was intended to be removed by the writ.

E CONTRA it was said, Suppose the word *Scotland* should be left out of the king's title, would that be a variance? The judicature in this case is still the same, and the pleading is good in substance.

And of that opinion was THE WHOLE COURT.

Cro. Eliz. 817. 8. Mod. 296. 10. Mod. 368. 283. 11. Mod. 171. 430. 12. Mod. 599. 5. Com. Dig. "Pleader" (3.L. 3.). 2. Stra. 1110. 1171. 1 Ld. Ray. 702. 715. 2. Ld. Ray. 819. 894. 1. Term Rep. 239.

(a) Orde v. Moreton, Yelv. 212.

Case 135. Hyley *against* Hyley.

If a man, after several legacies, bequeath *lands* to *A*, and a *house* to *B*. in tail, and all the rest and residue of his estate to be equally divided between them, excepting only that which he had given to *A*. and *B*. and the heirs of their bodies; *the reversion* in fee of the house on the death of *B*. without issue is within the exception, and shall go to the survivor.—S. C. Comb. 92. Ante, 45. 105. Hob. 32. Cro. Car. 369. Cro. Jac. 157 6. Co. 17. 1 Lev. 212. Cases Ch. 262. Cases T. T. 284. 1. Vezey, 10. 2. Vern. 558. 564. 2. Ld. Ray. 1325. 3. Com. Dig. "Devise" (N. 2.). (N. 23.). Comyns, 364. 1. Vern. 65. Prec. Ch. 202. 264. 6. Mod. 111. 9. Mod. 92. 10. Mod. 525. 11. Mod. 592. Gilb. Eq. Rep. 30. Fitzg. 70. 151. 228. 2. Stra. 1020. 1. Peer. Wms. 302. 603. 2. Peer. Wms. 198. 3. Peer. Wms. 56. 61. 295.

HYLEY had issue *William* his eldest son, who had issue *Peter*, *Charles*, and *John*. He by will devised a thousand pounds to his eldest son, and several parcels of land to other legatees: then he gave to *Peter* lands in tail male: to *John* a mansion-house (now in question) in tail male: he devised another house to his grandson *Charles* in like manner; and all the rest and remaining part of his estate he devised to his three grandsons equally to be divided amongst them, that only excepted which he had given to *Peter*, *Charles*, and *John*, and to the heirs of their bodies, whom he made executors. Then by another clause he devised, *viz.* "That if either of his executors die without issue, then the part or parts of him so dying shall go to the "survivor or survivors, equally to be divided." *John* the youngest grandson died without issue.

The question was, Whether *the reversion* of his house shall be divided between his surviving brothers or descend to his heir?

And

And IT WAS ADJUDGED, that the exception in the will did comprehend the reversion in fee, and that it did not pass; but without such an exception it had passed: as where a man devised his manor to another for years, and part of other lands to *B.* and his heirs, and all the *rest* of his lands to his brother in tail, it was held that by these words the reversion of the manor did pass (*a*).

HYLEY against HYLEY.

(*a*) It is said 1. Eq. Cas. Abr. 210. that this case has been denied to be law. But see the case of Willows *v.* Lydcott, infra, 229. 2. Vent. 285.; Hopewell *v.* Ackland, Salk. 239.; Wheeler *v.* Walroon, Allen, 28.; Cook *v.* Gerrard, 1. Lev. 200.; and the cases cited post. page 229, note (*b*).

* Anonymous.

Case 136.

AN INFANT, having entered into A STATUTE, brought an *audita querela* to avoid it. He was brought into the court, and two witnesses were sworn to prove his age, and then his appearance and *inspection* were recorded. He was bound in this case with two persons for sixteen hundred pounds, and had no more than two hundred pounds for his share.

On an *audita querela* by an *infant* to be relieved from a statute, his nonage shall be tried by *inspection*.

9. Co. 30. 2. Roll. Abr. 572. 1. And. 228. 3. Bulst. 307. Yelv. 88. 2. Inst. 483. Cro. Jac. 59. Palm. 326. 3. Bac. Abr. 135. 142. 144. 12. Mod. 197. 1. Peer. Wms. 737.

Lydcott *against* Willows.

Case 137.

EJECTMENT.—A special verdict was found, *viz.* That the testator being seised in fee of certain houses in *Bedfordbury*, and in *Parker's Lane*, did, by will, devise his houses in *Parker's Lane* to charitable uses; then he gave several specific legacies to several persons named in the said will; and then he devised his houses in *Bedfordbury* to *Edward Harris*, and *Mary*, his wife, for their lives; then follow these words, *viz.* "The better to enable my wife to pay my legacies, I give and bequeath to her and her heirs, all my messuages, lands, tenements, and *hereditaments* in the kingdom of *England*, not before disposed of, &c."

A testator devises his houses to *A.* for life, and afterwards devises to his wife, the better to enable her to pay debts and legacies, all his messuages, lands, tenements, and hereditaments, *not before disposed of.*—This devise carries the *reversion* in fee to the wife.

The question was, Whether this devise would carry the reversion of the houses in *Bedfordbury* to his wife?

ADJUDGED that it did not, but that it ought to go to the heir of the testator, who was plaintiff in this case; it being found that *Harris* and his wife were dead, and that the wife, who was executrix, had sufficient assets to pay the legacies without the reversion.

S. C. 1. Eq. Ab. 210. S. C. 2. Vent. 285. S. C. Carth. 50. Allen, 28. Stiles, 62. Salk. 239. Raym. 97. 2. Vern. 68[illegible].

But POWEL, *Justice*, was of another opinion, for that the word "hereditament" imports an inheritance; and if he had devised thus, *viz.* "the inheritance not before disposed of," the reversion had passed (*a*).

Comyns, 164. 9. Mod. 90. 102. 3. Peer Wms. 56. [illegible]

(*a*) See the case of Wheeler *v.* Walroon, Allen, 28.; Baker *v.* Edmonds, Stile, 62.; and Doe on the demise of Palmer *v.* Richards, 3. Term Rep. 356.

A WRIT

LYBCOTT *against* WILLOWS.

A WRIT OF ERROR was afterwards brought in the exchequer chamber upon this judgment, and, according to the opinion of POWEL, *Justice*, the judgment was reversed *(a)*.

(*a*) The same point admitted in the case of Cook *v.* Gerrard, 1. Lev. 210. and Hyley *v.* Hyley, ante, 228. It is said, however, that this last case has been denied to be law, 1. Eq. Cases Abr. 210. But see Rooke *v.* Rooke, 2. Vern. 461.; Chester *v.* Chester, 3. Peer. Wms. 56.; Sir Thomas Littleton's Case, 2. Vent. 351.; Strode *v.* Falkland, 2. Vern. 623.; Goodtitle *v.* Knot, Cowp. 43.; Doe *v.* Saund, Cowp. 420.

Case 138.

Memorandum.

No *certiorari* to be granted without motion.

A RULE OF COURT was made, that no *certiorari* should go to the sessions of *Ely* without motion in court, or signing of it by a Judge in his chamber.

* [230]

Cro. Eliz. 48. Comyns, 76. 12. Mod. 386. 9. Mod. 138. 3. Salk. 79. 8. Mod. 135. 346. 374. 10. Mod. 278. 11. Mod. 403. 643. 1. Stra. 549. 583. 630. 704. 2. Stra. 727. 877. 1047. 1068. 1202. 1209. Ld. Ray. 216. 581. 836. Cowp. 749. 2. Hawk. P. C. 406. 1. Ba. Ab. 351.

* But MR. POLLEXFEN insisted, that the sessions there did not differ from other courts and franchises; for the inferior courts in *London* are of as large a jurisdiction as any, and yet a *certiorari* goes to them, and so it ought to go to *Ely*; for it is the right of the subject to remove his cause hither. Their course in the royal franchise of *Ely* is to hold the sessions there twice a year, VIZ. in *March* and *September*, in which two months the Judges are seldom in town; and if this Court should deny a *certiorari*, the court of common pleas would grant it.

THE ATTORNEY GENERAL *contra*. This franchise of *Ely* is of greater privilege and authority than any inferior court, for it has many *regalia*, though it is not a county palatine. A *certiorari* will not lie to the *grand sessions*, nor to a *county palatine*, to remove civil causes: it is true, it lies to remove indictments for riots *(a)*; and this franchise, being truly called royal, has equal privilege with a county palatine, and therefore a *certiorari* will not lie.

But no rule was made.

(*a*) 1. Roll. Abr. 394. Rex *v.* Lewis, 2. Stra. 704.; Rex *v.* Inhabitants of Clace, 4. Burr. 2456.; Rex *v.* Griffiths, 3. Term Rep. 658.

Case 139.

Osborn *against* Steward.

Trinity Term, 2. Jac. 2. Roll 302.

Quære, If, on the reservation of a yearly rent, and *a heriot* or forty shillings in lieu thereof, the beast of *a stranger*, being on the land, may be distrained for the *heriot?*—S. C. 3. Salk. 181. S. C. 2. Lutw. 1361. S. C. Nel Lut. 432. S. C. Lex Man. App. 119. Plowd. 96. Cro. Car. 260. 2. Com. Dig. 518. Cowp. 62.

TRESPASS.—The case upon the pleadings was this: A lease was made of land for ninety-nine years, if *Margery* and *Dorothy Upton* should so long live, reserving a yearly rent and an heriot, or forty shillings in lieu thereof, after the death of either of them, PROVIDED that no heriot shall be paid after the death of *Margery* living *Dorothy*.—*Margery* survived, and is since dead.

The

The question was, Whether, upon this reservation, the beast of any person being upon the land may be distrained for an heriot? OSBORNE against STEWARD.

MR. POLLEXFEN argued, that it could not, because the words in the reservation ought to be taken very strictly, and not to be carried farther than the plain expression. Where words are doubtful, they have been always expounded against the lessor; as if a lease be made for years reserving a rent *durante termino* to the lessor, his executors, or assigns, and the lessor dies, his heir shall not have the rent (*a*), because it is reserved to the executors. * But here is no room for any doubt upon these words; for if a lease for years be made, in which there is a covenant that the lessee shall pay the rent without any other words, this determines upon the death of the lessee. So where a lease was made for ninety-nine years, if *A. B. C.* or any of them, should so long live, reserving rent to him and his executors, and also, at or upon the death of either, his or their best beast, in the name of an heriot, provided that if *B.* or *C.* die living *A.* no heriot shall be paid after their deaths (*b*), and *A.* assigned his term, and the beast of the assignee was taken for an heriot, it was adjudged that it could not, for the words "his or their" shall not be carried farther than to the persons named in the limitation (*c*). The Books which affirm that a man may seize for an heriot-service (*d*) cannot be brought as authorities in this case, because they are all upon tenures between lord and tenant, and not upon particular reservations, as this is. The old Books say (*e*), that if a tenant by fealty and heriot-service made his executor and died, that the lord might seize the best beast of his tenant in the hands of the executor; and if he could not find any beast, then he might distrain the executor: and the reason of this seizure was, because immediately upon the death of the tenant a property was vested in the lord; but it was held always unreasonable to put him to distrain when he might seize (*f*). And it is now held, that for heriot-service the lord may either distrain or seize; but then if he make a seizure, it must be the very beast of the tenant; but if he distrain, he may take any person's cattle upon the land (*g*). So that admitting this to be law, yet it proves nothing to this matter, because such services being by tenure, shall not be extended to those which are created within time of memory upon particular reservations; for by those ancient tenures the lords had many privileges which cannot be upon re-

* [231]

2. Vern. 421. Prec. Ch. 516. 10. Mod. 158. 2. Peer. Wms. 196. 1. Vern. 441.

(*a*) Richmond *v.* Butcher, Cro. Eliz 217. S. C. 2. Roll. Abr. 448. But see Surry *v.* Brown, Latch. 99.; the case of Sacheverel *v.* Froggart, 1. Vent. 161. 2. Saund. 367. Raym. 213. 2. Lev. 13.; and Mr. Hargrave's Co. Lit. note (8), page 47. a.

(*b*) Randall *v.* Scory, Cro. Car. 313. 2. Roll. Abr. 451. Hetley, 58. 1. Show. 81. 2. Lutw. 1366. 1. Mod. 217. 2. Mod. 93.

(*c*) See Ld. Ray. 169. 308. Owen, 146.

(*d*) March, 165. 2. Inst. 132.

(*e*) Brook's Abr. "Heriot," pl. 4.

(*f*) Plowd. 95.

(*g*) Cro. Car. 260. Jones, 300. See also 1. Show. 81. Salk. 356. Ld. Ray. 169. 308. 3. Bac. Abr. 53.

servations

OSBORN *against* STAWARD.

servations. Besides, the seizures in those cases were by the lords, who continued so to be at the very time of the seizure; but in our case the lease is determined by the death of the last life; so the privilege is lost, and then it must stand upon the particular words in the deed.

Sed adjournatur into the exchequer chamber, the Judges being divided in opinion (*a*).

(*a*) MR. POLLEXFEN argued this case in the exchequer chamber, S. C. Nelson's Lutw. 438.; but it does not appear that any judgment was given. S. C. 2. Lutw. 1368. S. C. 3. Salk. 181. See the case of Lanyon *v.* Carne, 2. Saund 165.

* [232]

Case 140.

* Shipley *against* Chappel.

Easter Term, 3. Jac. 2. Roll 404.

Condition of two parts in the disjunctive, and one part becomes impossible to be done, yet the other must be performed according to the subsequent matter.

1. Roll. Abr. 450. Co. Lit. 206. 3. Lev. 74. Moor, 357. Cro. Eliz. 277. 398. Poph. 98. Jones, 171. 2. Mod. 202. 8. Mod. 23. 10. Mod. 18. 334. 370. 11. Mod. 45. 12. Mod. 404. 1. Vern. 35. Cases T. T. 109. 2. Com. Dig. "Condition" (D. 1.).

THE PLAINTIFF *Shipley*, as administrator of *Hannah* his wife, brought an action of debt upon a bond, against *Chappel*, an attorney, for one hundred and forty pounds.

The defendant craved oyer of the condition, which was, *viz.* "WHEREAS *Hannah Goddard* (who was wife to the plaintiff) "and *Thomas Chappel* of *Gray's Inn*, in the county of *Middlesex*, "are coparceners (according to the common law) of one house, "with the appurtenances, in *Sheffield*, in the possession of *William* "*White*; and whereas the said *Hannah Goddard* hath paid unto "*Thomas Chappel* the father, for the use of his son, the sum of "seventy-two pounds, in consideration that the said *Thomas* "*Chappel* the son, when he attains the age of twenty-one years "(which will be about *Midsummer* next), do by good conveyance "in the law, at the costs and charges of the said *Hannah God-* "*dard*, convey his said moiety of the said house, with the appur- "tenances, unto her and her heirs: NOW THE CONDITION of "this obligation is such, that if the said *Thomas Chappel* the son "shall at the age of twenty-one years convey his said moiety of "the said house, or otherwise if the said *Thomas Chappel* the fa- "ther, his heirs, executors, or administrators, shall pay, or cause "to be paid, the sum of seventy-two pounds, with lawful interest "for the same, unto the said *Hannah Goddard*, her executors, "administrators, or assigns, that then this obligation to be void." Then he PLEADED, that his son *Thomas Chappel* was coparcener with *Hannah Goddard*, as co-heiress of *Elizabeth Goddard*; that *Thomas* came of age; and that before that time *Hannah* died without issue.

The plaintiff replied, that true it is that before *Thomas Chappel* the son came of age, the said *Hannah* died without issue of her body; that *Elizabeth Goddard*, before the making of the said bond, died seised in fee of the said messuage; but that she first married with one *Malm Stacy*, by whom she had issue *Lydia*; that *Malm* her husband died, and *Elizabeth* married *John Goddard*, by whom he had issue *Hannah*, their only daughter and heir; that

John

John Goddard died, and that *Lydia Stacy* married the defendant *Thomas Chappel*, by whom he had issue *Thomas Chappel* his son; that *Lydia* died in the life-time of *Elizabeth*; and that *Thomas Chappel* had not paid the seventy-two pounds to *Hannah* in her life-time, or to *John Shipley* after her death.

The * defendant demurred; and the plaintiff joined in demurrer. * [233]

THE QUESTION was, Since the word "heirs" in the condition being a word of *limitation*, and not of any *designation* of the person, whether the death of *Hannah Goddard* before *Chappel* the son came of age, and who was to make the conveyance, shall excuse the defendant from the payment of the money?

Those who argued *for the defendant* chiefly relied upon *Laughter's Case (a)*, which was thus: *Laughter* and *Rainsford* were bound, that if *Rainsford* after marriage with *Gillman*, together with the said *Gillman*, shall sell a messuage, &c. if then *Rainsford* do, or shall in his life-time, purchase for the said *Gillman* and her heirs and assigns lands of as good value as the money by him received by the said sale, or leave her as much money at his decease, then, &c. *Gillman* died; *Rainsford* did not purchase lands of an equal value with that he sold; and upon demurrer it was held, that where a condition consists of two parts in the *disjunctive*, and both possible at the time of the bond made, and afterwards one is become impossible by the act of God, there the obligor is not bound to perform the other part, because the condition is made for the benefit of the obligor, and shall be taken most beneficially for him who had election either to perform the one or the other, to save the penalty of the bond.

But the counsel *for the plaintiff* said, that the whole intent of the condition, in that case, was to provide a security for *G.* who died before her husband; so that nobody could be hurt for the non-performance of that condition, there being no manner of necessity that any thing should be done in order to it after her decease. It is quite otherwise in the case at bar, for *Hannah Goddard* paid money for the house; and certainly it was never intended that *Chappel* the father, to whom the money was paid, should have both house and money. If she had lived, the house ought to have been conveyed to her; now she is dead the money ought to be paid, for it is not lost by her death. In *Laughter's Case*, the person who was to do the thing was the obligor himself; but here the father undertakes for his son, that he should convey when he came of age, or to repay the money; so that it is not properly a condition in the disjunctive, for it is no more than if it had been penned after this manner, * *viz.* The father undertakes for his son that he shall convey at the age of twenty-one years; and if he refuse, then the father is to repay what money he received. Besides, * [234]

(a) 5. Co. 21. b. And see Shepherd's Touchstone, 134. 1. Viner. Abr. "Condition" (Q.). "Condition" (C. a.). 2. Com. Dig.

LITCHMERE *against* THOROWGOOD AND ANOTHER SHERIFF OF LONDON.

One *Toplady*, a vintner, on the 28th of *April* became a bankrupt, against whom a judgment was formerly obtained; the judgment creditor sued out a *fieri facias*; and the sheriffs of *London*, by virtue thereof, did on the 29th day of *April* seize the goods of the said *Toplady*. After the seizure, and before any *venditioni exponas*, viz. on the 4th *May*, an *extent* (which is a prerogative writ) issued out of the exchequer against two persons who were indebted to the king; and by inquisition this *Toplady* was found to be indebted to them; whereupon parcel of the goods in the declaration was seized by the sheriffs upon the said *extent*, and sold, and the money paid to the creditors; but before the said sale, or any execution of the exchequer process, a commission of bankruptcy was had against *Toplady*; and the commissioners on the second of *June* assigned the goods to the plaintiff.

The question was, FIRST, Whether this *extent* did not come too late? And IT WAS HELD it did (*a*).

SECONDLY, Whether the *fieri facias* was well executed, so that the assignees of the bankrupt's estate could not have a title to those goods which were taken before in execution, and so *in custodiâ legis*?

And IT WAS HELD that they had no title (*b*).

(*a*) It is said on this point in S. C. Comb. 123. that HOLT, *Chief Justice*, was of opinion, that the property of the goods was vested by the delivery of the *fieri facias*; and therefore the *extent* came too late; but LORD MANSFIELD, in Cooper *v.* Chitty, 1. Burr. 36. says, this must be a mistake, for that no inception of an execution can bar THE CROWN. But it is said, that the report, with respect to this observation, is probably misstated, 4. Term. Rep 412.; and it is decided, in the case of Upham *v.* Sumner, 2. Bl. Rep. 1294. that a judgment recovered by a subject, though not completely executed, shall be preferred to the king's extent sued out posterior to the judgment: and also in the case of Rourke *v.* Daryell, 4. Term Rep. 402. that if goods be taken in execution on a *fieri facias* against the king's debtor, and, before they are sold, an extent come on the king's suit, grounded on a bond-debt, tested after the delivery of the *fieri facias* to the sheriff, the goods cannot be taken upon *the extent*. See also 2. Com. Dig. 538.

(*b*) The ground upon which the Court decided this point was, that the taking being lawful at the time, the officer could not be made a trespasser by relation, S. C. 1. Show. 12. 1. Burr. 35, 36. See also Bailey *v.* Bunning, 1. Leon. 173.; and Philips *v.* Thompson, 3. Lev. 192.; Cooper *v.* Chitty, 1. Burr. 20. to 37. And it is also decided, in the case of Smith and Another, Assignees of Clarke, *v.* Milles, that *trespass* will not lie by the assignees of a bankrupt against a sheriff for taking the goods of a bankrupt in execution after an act of bankruptcy, and before the issuing of the commission, notwithstanding he sells them after the issuing of the commission, and after a provisional assignment and notice from the provisional assignee not to sell, but the assignees may bring *trover*. 1. Term Rep. 475.

Case 143.

Fitzgerald *against* Villiers.

Infant must appear by guardian.

WRIT OF ERROR upon a judgment in *dower*.—The error assigned was, That the tenant in dower was *an infant*, and no warrant was alledged of the admission of any *guardian*, that it might

S. C. Comb. 88. 2. Vern. 342. Prec. Ch. 376. 8. Mod. 25. 2. Barnes, 326. Fitzg. 1. 114. 1 Salk. 2. Peer. Wms. 119. 297. 3. Peer. Wms. 140. 1. Stra. 114. 304. 445. 708. 2. Stra. 1076. Com. Dig. "Pleader" (2. C. 1.). 3. Bac. Abr. 150. *notis*. Cowp. 128.

might appear to be the act of the Court. It is true, an infant may sue by *prochein ami*, but shall not appear by *attorney* but by *guardian*, because it is intended by law, that he has not sufficient discretion to chuse an attorney, therefore it is provided that he appear *per guardianum*; which is done by the Court, who are always careful of infancy, and a special entry is made upon the roll *(a)*; VIZ. *per guardianum ad hoc per Curiam admissum*, *&c.*

FITZGERALD *against* VILLIERS.

SECONDLY, The appearance is by the guardian in his own name, VIZ. *et prædicta* KATHERINA FITZGERALD *per* RICHARDUM POWER * *guardianum suum venit et dicit quòd ipse*, *&c.* It should have been in the name of the party, *quòd ipsa*, *&c.* [237]

Adjournatur.

(*a*) 29. Assize, pl. 67. Bridgm. 74. Lit. 92. Hetley, 52. 3. Cro. 158. Bk. Ent. 45. Hutton, 92. 4. Co. 53. Moor, 434. Hob. 5.

Harrison *against* Austin.

Case 144.

Trinity Term, 3. Jac. 2. Roll 997.

A SETTLEMENT was made as follows: " If I have no " issue, and in case I die without issue of my body lawfully " begotten, then I give, grant, and confirm my land, &c. to my " kinswoman *Sarah Stokes*, to have and to hold the same to the " use of myself for life, and after my decease to the use of the said " *Sarah* and the heirs of her body to be begotten, with remainders " over, &c."

If a man, in consideration of marriage, "*give*, "*grant, and confirm*" land to *A.* to the use of *himself* for life, and after his decease to the use of the said *A.* in tail special; this amounts to a *covenant to stand seised.*

The question was, Whether this amounts to *a covenant to stand seised*, so as to raise *an use* to *Sarah* without transmutation of the possession?

The objection against it was, That uses are created chiefly by the intention of the parties, and that by these words " grant and " confirm" the feoffor did intend the land should pass at common law; so that it could not be *a covenant to stand seised*. It is like the case where a letter of attorney is in the deed, or a covenant to make livery; there nothing shall pass by way of use but the possession, according to the course of the common law (*a*); and therefore there being neither livery and seisin nor attornment, no use will pass to *Sarah*. It cannot be a *bargain and sale*, for that is only where a recompence is on each side to make the contract good: besides, the deed is not inrolled.

S. C. Comb. 128. S. C. Carth. 38. 2. Inst. 672. 1. Vent. 137. Hob. 277. 1. Mod. 175. 9. Mod. 161. 10. Mod. 47. 143. 436. 12. Mod. 101. 162. 399. Fitzg. 301. Comyns, 119. Vern. 40. Stra. 934. 1. Ld. Ray. 160. 289 2. Ld. Ray. 1419. 2. Com. Dig. 571. 2. Show. 11. 3. Term Rep. 490.

(*a*) 1. Sid. 26. Moor, 687. Dyer, 96. 2. Roll. Abr. 786. Winch. 59. Plowd. 300.

HARRISON *against* AUSTIN.

To this it was answered; That it shall be construed to be *a covenant to stand seised*, though the formal words are wanting to make it so; and for that purpose it was compared to *Fox's Case* (*a*), who, being seised in fee, demised his land to *C.* for life, remainder over for life, reserving a rent; and afterwards by indenture, in consideration of money, did "demise, grant, and set" the same lands to *D.* for ninety-nine years, reserving a rent, and the lessee for life did not attorn; in which case there was not one word of any *use*, or any *attornment* to make it pass by grant; and the question was, Whether this lease for years shall amount to *a bargain and sale*, so that the reversion, together with the rent, shall pass to the lessee without attornment? and it was held, that by construction of law it did amount to *a bargain and sale*, for the words import as much.

And in this case IT WAS ADJUDGED that it was a covenant to stand seised (*b*).

*[238]

(*a*) 8. Co. 93. Hob. 277.
(*b*) See Rigden *v.* Vallier, Vezey, 252.; Doe *v.* Simpson, 2. Wilf. 22.

Case 145.

* Hexham *against* Coniers.

An ejectment *de uno messuagio sive tenemento* is not good, though after verdict.—*Sed quære.*

March. 96. Cro. Car. 555. 288. Jones, 454.

IN EJECTMENT the plaintiff declared *de uno messuagio sive tenemento*, and had a verdict.

But judgment was arrested, Because an ejectment will not lie of *a tenement*; for it is a word of an uncertain signification; it may be an advowson, house, or land. But it is good in dower; so is *messuagium sive tenementum* called "*The Black Swan*," for this addition makes it certain that the tenement intended is a house (*a*).

Hard. 173. Noy, 86. Cro. Jac. 125. 621. 3. Leon. 228. 1. Sid. 295. 8. Mod. 277. 355. 1. Barnes, 117. 2. Barnes, 150. 2. Stra. 834. 1063. 1084. 3. Wilf. 23. 4. Mod. 136. 2. Bac. Abr. 169, 170. 1. Ld. Ray. 191. 1. Burr. 623. 2. Ld. Ray. 1470.

(*a*) See Coppleton *v.* Piper, 1. Ld. Ray. 191. where in *trespass* the word *tenementum* is held sufficiently certain; but that an *ejectment de uno tenemento* is ill for uncertainty; and there are many old cases to the same effect, Goodtitle *v.* Walton, 2. Stra. 834. Noy, 86. Poph. 197. Cro. Eliz. 116. 186. 1. Burr. 625.; but of late the Courts have endeavoured to over-rule this objection, Welch *v.* Flood, 3. Wilf. 23.; for the doctrine of those cases ought not to be extended, Cowp. 350. And in the case of Stewart *v.* Denton, an ejectment laid for "a messuage *and* tenement" was held sufficiently certain *after verdict*; and MR. JUSTICE BULLER said, he remembered a case where "messuage *or* tenement" had been held sufficiently certain, 1. Term Rep. 11.

Case 146.

The King *against* Bunny.

A *melius inquirendum* granted on the misbehaviour of the *coroner* shall be directed to the sheriff.—S. C. Salk. 190. S. C. Carth. 72. Ante, 80. 101. 1. Mod. 82. Cro. Eliz. 371. 3. Keb. 800. 1. Hawk. P. C. 104. 2. Hawk. P. C. 88. 1. Bac. Abr. 496. 1. Salk 190. 12. Mod. 496. 1. Stra. 22. 167. 533. 2. Stra. 1073. 1097.

A MOTION was made for a *melius inquirendum* to be directed to a coroner, who had returned his inquisition upon the death of *Bunny*, that he was not *compos mentis*, when in truth he was *felo de se*.

But

But it was opposed by PEMBERTON, *Serjeant*, and MR. POLLEXFEN, who said, that the law gives great credit to the inquest of a coroner, and that a *melius inquirendum* is seldom or never granted, though it appear to the Court upon affidavits that the party had his senses. It has been granted where any fault is in the coroner, or any uncertainty in the inquisition returned. That there is such a writ it cannot be denied; but it is generally granted upon offices or tenures, and directed to the sheriff, but never to a coroner in the case of a *felo de se*, who makes his enquiry *super visum corporis*.

MICHAELMAS TERM,

The Fourth of James the Second,

IN

The King's Bench.

Sir Robert Wright, *Knt. Chief Justice.*

Sir John Powell, *Knt.*
Sir Robert Baldock, *Knt.* } *Justices.*
Sir Thomas Stringer, *Knt.*

Sir Thomas Powis, *Knt. Attorney General.*
Sir William Williams, *Knt. Solicitor General.*

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*[239]

* Memorandum. Case 147.

IN *Trinity Vacation* last, MR. JUSTICE HOLLOWAY and MR. JUSTICE THOMAS POWELL had their *quietus*, and MR. SERJEANT BALDOCK and MR. SERJEANT STRINGER were made Justices of this Court; *Baldock* and *Stringer* promoted.

And MR. JUSTICE ALLIBON (who was a Roman Catholick) died in the same Vacation, and SIR JOHN POWELL, one of the Barons of the Exchequer, was made a Justice of this Court. POWELL, *Baron*, promoted.

SIR THOMAS JENNOR, another of the Barons of the Exchequer, was made a Justice of the Common Pleas. JENNOR, *Baron*, promoted.

MR. SERJEANT ROTHERAM and MR. SERJEANT INGOLDBY were made Barons of the Exchequer. *Rotheram* and *Ingoldby* made Barons.

Case 148.

Shuttleworth *against* Garnet.

Trinity Term, 1. Will. & Mary, Roll 965.

If a copyholder be admitted, and, before payment of the fine, the lord die and the manor descends to his son and heir, who also dies, the executor of the son may maintain an *indebitatus assumpsit* against the copyholder to recover this fine; whether it be a fine certain, or at the will of the lord.

S. C. 3. Lev. 261. S. C. Comb. 151. S. C. 1. Show. 35. S. C. Carth. 90. 2. Mod. 229. 260. 2. Leon. 179. 1. Vent. 298. 3. Lev. 262. 1. Show. 78. Carth. 95. 338 1. Ld. Ray. 502. Stra. 406. 1. Com. Dig. 153. 2. Com. Dig. 507. 3. Burr. 1717 1. Bac. Abr. 165. 2. Bac. Abr. 16. 440. 444. Dougl. 729. 2. Ld. Ray. 1056. 10. Mod. 23. 69 11. Mod. 91. 146. 12. Mod. 16. 310. 324. 511. 1. Stra. 763. 776. 2. Stra. 1089.

THE DEFENDANT was tenant of customary lands held of the manor of *A.* of which manor *B* was lord; that a fine was due to him for an admission; that upon the death of the said lord, the manor descended to *W.* as his son and heir, who died, and the plaintiff, as executor to the heir, brought an *indebitatus assumpsit* for this fine. He declared also that the defendant was indebted to him in twenty-five pounds for a reasonable fine, &c. (*a*). * The plaintiff had a verdict and entire damages.

It was now moved in arrest of judgment, that an *indebitatus* will not lie for a *customary fine*, because it does not arise upon any contract of the parties, but upon the tenure of the land; for upon the death of the lord there is a relief paid; for there must be some personal contract to maintain an action of *debt* or an *indebitatus assumpsit*; and therefore it was held, that where the plaintiff *locasset* a warehouse to the defendant, he promised to pay eight shillings *per* week, an *assumpsit* was brought for this rent, and a verdict for the plaintiff: and a motion was made in arrest of judgment, that this was a lease at will, and the weekly payment was in the nature of a rent; and it was agreed that an *assumpsit* would not lie for a rent reserved (*b*), because it sounds in the realty; but because it was only a promise in consideration of the occupying of the warehouse, the action was held to be well brought (*c*).

SECONDLY, Where the cause of an action is not grounded upon a contract but upon some special matter, there an *indebitatus assumpsit* will not lie; and therefore it will not lie upon *a bill of exchange*, or upon *an award*, or for *rent*, though there is a privity both of contract and estate, without a special *assumpsit*.

E CONTRA it was argued, That the action lies; for though a fine savours of the realty, yet it is a certain duty. In all cases where debt will lie upon a simple contract, there an *assumpsit* will lie likewise. It is true, this does concern the inheritance, but yet it is a contract that the tenant shall be admitted paying the fine. It has been also maintained for money had and received out of the office of register for the plaintiff's use (*d*), and for *scavage* money due to the mayor and commonalty of *London*, which is also an inheritance. It is a contract implied by law, and therefore the action is well brought (*e*).

(*a*) See Moor *v.* the Mayor of Hastings, 2. Stra. 1070.

(*b*) Dartnal *v.* Morgan, Cro. Jac. 598. Jones, 397.

(*c*) And now by 11. *Geo.* 2. c. 19. s. 14. "Landlords, where the agreement "is not by deed, may recover a reasonable satisfaction for the premises held "or occupied, in an action on the case "for the use and occupation of what was so held or enjoyed; and if on the trial any *parol* demise or agreement, not being by deed, whereon a certain rent reserved shall appear, it shall be evidence of the *quantum* of damages to be recovered."

(*d*) 3. Keb. 677.

(*e*) See Halton *v.* Hassell, 2. Stra. 1042.

DOLBEN,

DOLBEN, EYRE, and GREGORY, *Justices*, in *Michaelmas Term* 1. *Will. & Mary* were of that opinion; and judgment was given for the plaintiff.

SHUTTLEWORTH *against* GARNETT.

But THE CHIEF JUSTICE was of another opinion; for he held that if the defendant had died indebted to another by bond, and had not assets besides what would satisfy this fine, if the executor had paid it to the plaintiff, it would have been a *devastavit* in him. * Suppose the defendant promises, that in consideration that the plaintiff would demise to him certain lands, that then he would pay the rent; if the defendant plead *non assumpsit*, the plaintiff must prove an express promise or be non-suit (*a*). Also here is no tenure or custom set out.

* [241]

Yet, by the opinion of THE OTHER THREE JUSTICES, the plaintiff had his judgment (*b*).

(*a*) Acton *v.* Symonds, Cro. Car. 414. But see 11. *Geo.* 2. c. 19. s. 14. ante, *notis*.

(*b*) See Borough's Case, 1. Ld. Ray. 36.; the case of Evelyn *v.* Chichester, 3. Burr. 1718.

The King *against* Johnson.

Case 149.

Quære, If a judgment obtained by the king on a penal statute for a fraud upon the revenue, is discharged by a general pardon of "all offences, "misdemeanors, and forfeitures, *except* "frauds, misdemeanors, "and offences "in the collecting, paying, "or answering "the revenue, "or any part "thereof, or "any money "due or to be "due, and all "forfeitures, "penalties, and "*nomine pœna's* "arising "thereon."

INFORMATION upon the statute of 29. & 30. *Car.* 2. c. 1. prohibiting the importation of several *French* commodities, and amongst the rest *lace*, under the penalty of one hundred pounds, to be paid by the importer, and fifty pounds by the vendor, and the goods to be forfeited.

The information sets forth, that a packet containing so many yards of lace was imported by the defendant from *France*, and that he did conceal it to hinder the seizure; and that he did privately sell it *contra formam statuti*.

Upon not guilty pleaded, the king had a verdict; and on the 2d of *October* there came forth *a general pardon*, in which were these words: "That the subjects shall not be sued or vexed, &c. in "their bodies, goods, or chattels, lands, or tenements, for any "matter, cause or contempt, misdemeanor, forfeiture, offence, "or any other thing heretofore done, committed, or omitted, "against us, EXCEPT all concealments, frauds, corruptions, mis-"demeanors, and offences, whereby we or our late brother have "been deceived in the collection, payment, or answering of our "revenues or any part thereof, or any other money due or to be "due to us, or received for us or him, and all forfeitures, pe-"nalties, and *nomine pœna's* thereupon arising, and all indictments "and informations or other process and proceedings now depend-"ing or to be depending thereupon."

The question now was, Whether this forfeiture was excused by this pardon?

5. Co. 4[illegible]. 3. Lev. 13[illegible]. Cro. Car. [illegible]. Hard. 367. 8. Mod. 104.

The King *against* Johnson.

The Attorney General argued, that it was not, becauſe an intereſt is veſted in the king by the judgment, and that no particular or general pardon ſhall diveſt it without words of reſtitution. So was *Tooms's Caſe (a)*, who had judgment againſt another, and then became *felo de ſe*; his adminiſtrator brought a *ſcire facias quare executionem non haberet*; the debtor pleaded, that after the [242] judgment the inteſtate hanged himſelf, which was found by * the coroner's inqueſt returned into this court; the plaintiff replied the act of pardon; but it was adjudged for the defendant; for when the inquiſition was returned, then the debt was veſted in the king, which could not be diveſted without particular words of reſtitution, and which were wanting in that act of pardon. The moſt proper word in the body of this pardon which ſeems to excuſe the defendant, is the word "offence;" but the ſame word is Ld. Ray. 709. likewiſe in the exception, *viz.* "except all offences, &c. in collecting or paying of money due to us, and all forfeitures, &c." Now the concealing of forfeited goods from ſeizure is an offence excepted; for it is a remedy for the king's duty, of which he was hindered by the concealment. It is true, the firſt part of the pardon excuſes all miſdemeanors committed againſt the king in his ſtanding revenue; but this exception takes in all concealments and frauds in anſwering of the revenue, and this information is principally grounded upon fraud; ſo that the exception ought to be taken as largely for the king as the pardon itſelf to diſcharge the ſubject *(b)*. No fraud tending to the diminution of the revenue is pardoned, for it excepts not only all concealments in collecting the revenue, but other money due or to be due to the king. If therefore when the king is entitled by inquiſition, office, or record, there muſt be expreſs and not general words to pardon it; and ſince this fact was committed before the pardon came out, and ſo found by the jury, whoſe verdict is of more value than an inqueſt of office; ſo that the king by this means is entitled to the goods by record, and that before the pardon; for theſe reaſons it cannot be reveſted in the party.

Pemberton, *Serjeant*, and Mr. Finch *contra*. The queſtion is, What intereſt the king has by this verdict? for as to the offence itſelf, it is within the body of the pardon; for all miſdemeanors and offences are pardoned; and the exception does not reach this caſe, for that excepts miſdemeanors in anſwering of the revenues. Now that which ariſes by a forfeiture can never be taken to be part of the king's revenue, becauſe the revenue is properly a ſtated duty originally ſettled on the king; and the penalty to be inflicted for this miſdemeanor cannot be a revenue, becauſe the Court have not yet given judgment; ſo that it is uncertain what fine they will ſet; and this appears more plain, becauſe the king may aſ- [243] ſign his revenue, but cannot grant over a penalty. * The information is not grounded upon any act of parliament which eſtabliſhes the revenue, but for concealing of a thing forfeited to pre-

(a) 1. Saund. 361.

(b) See 5. Co. 56.

vent

vent the ſeizure thereof, which indeed may be a caſual revenue, as all fines are; ſo that if this ſhould be taken as an offence committed againſt the king in deceiving him of this revenue, then the firſt part of the pardon diſcharges all ſuch offences, and the exception pardons none. It is for theſe reaſons that the caſe cannot fall under any of the words in the exception, no not under theſe words, *viz.* "money due or to be due to the king," becauſe no money is yet due to him. It is true, the jury have found it a miſdemeanor, which is finable; but until the fine is ſet no money is due, becauſe the Court may ſet a greater or leſs fine, as they ſhall ſee cauſe: and if any other conſtruction ſhould be made of this exception, then every thing for which a fine may be ſet is excepted; and this will be to make the pardon ſignify nothing; for what is meant by offences and miſdemeanors if they ſhould be pardoned, and yet the fine ariſing thereon ſhould not? But admitting that all offences relating to the concealment of collecting of the revenue are excepted, then this revenue muſt be either antecedent, or it muſt ariſe by the fine. It is no antecedent revenue; this appears by the book of rates, wherein the king's ſtated revenue is ſet down, and no mention of this; ſo that the revenue to which this relates muſt ariſe upon the offence; and what an abſurd thing is it to ſay, that all offences are pardoned by one part of this general pardon, and by the exception none are pardoned? Beſides, the information is not grounded upon that part of the ſtatute which inflicts a penalty upon the perſon who expoſes prohibited goods to ſale, for then they would ſue for the fifty pounds; therefore it muſt be upon the forfeiture, which is expreſsly pardoned; and though there is a conviction, yet nothing is veſted in the king before judgment, becauſe it may be arreſted; and therefore *Tooms's Caſe* is in no wiſe applicable to this, for the debt which was due to him was actually veſted in the king by the inquiſition returned here, which found him to be *felo de ſe.*

Adjournatur.

*[244]

Caſe 150.

* Coſſart *againſt* Lawdley.

If the maſter of a ſhip take up monies during the voyage at any place abroad for neceſſaries wanted *ſuper altum mare,* and *hypothecate* the ſhip, the [illegible] may ſue the *hypothecation-bond,* in the court of *admiralty,* although it was given at land.—S. C. Comb. 135. S. C. Holt, 48. Ante, 194. 1. Vent. 1. Moor, 918. Hob. 12. Stiles, 171. 1. Sid. 453. Winch, 8. Cro. Car. 603. Latch. 11. 2. Brownl. 37. 4. Inſt. 134. 1. Vern. 297. 465. 10. Mod. 78. 264. 11. Mod. 6. 44. 12. Mod. 134. 366. 511. 526. Gilb. E. R. 227. Fitzg. 197. 1. Stra. 695. 2. Stra. 761. 890. 930. 1. Ld. Ray. 22. 152. 272. 446. 578. 2. Ld. Ray 8 6. 933. 982. 1285. Molloy de Jure Mar. 62. 1. Salk. 34, 35. Ld. Ray. 1452. 3. Bac. Abr. 512 594. 1. Com. Dig. 274. 4. Burr. 1944. Cowp. 639. 2. Term Rep. 649.

A LIBEL in the *admiralty* againſt a ſhip called THE SUSSEX KETCH; ſetting forth, that the ſaid ſhip wanted neceſſaries *ſuper altum mare*; and that *the maſter* took up ſeveral ſums of the

plaintiff

COSBART *against* LAWDLEY.

plaintiff at *Rotterdam*, for which he did *hypothecate* the ſaid ſhip; and upon a ſuggeſtion that this contract was made at *St. Katherine's infra corpus comitatûs*, counſel moved for a prohibition.

A queſtion then aroſe, Whether a maſter of a veſſel can pawn it *on the coaſt* for neceſſaries? and, Whether the perſon to whom it is pawned ſhall ſue for the money in THE ADMIRALTY here?

By the *common law* a maſter of a ſhip had neither a general or ſpecial property in it, and therefore could not pawn it; but by the *civil law* in caſes of neceſſity he may, rather than the voyage ſhould be loſt; and if any ſuch cauſe appear, it is within the juriſdiction of the admiralty, but then the pawning muſt be *ſuper altum mare*.

Now the ſtatute of 28. *Hen.* 8. c. 15. which abridges the juriſdiction of the admiralty in trials of pirates, and which appoints offences committed on the ſea to be tried by a commiſſion under the great ſeal, directed to the admiral and others, according to the courſe of the common law, and not according to the civil law, gives a remedy in this very caſe; for it provides, "that this act "extend not to be prejudicial or hurtful to any perſon for taking "any victuals, cables, ropes, anchors, or ſails, which any ſuch "perſon (compelled by neceſſity) taketh of or in any ſhip which "may conveniently ſpare the ſame, ſo the ſame perſon pay out of "hand for the ſame victuals, cables, ropes, anchors, or ſails, money "or money-worth to the value of the thing ſo taken, &c." So that this is an excepted caſe, becauſe of the neceſſity; and it is like the caſes of ſuing for *mariners wages* in this court. The ſervice was at ſea, ſo that the admiralty has no proper juriſdiction over this matter. It is true, prohibitions have been denied for mariners wages; the firſt is reported by WINCH, *Juſtice (a)*; but the reaſon ſeems to be, becauſe they proceed in the admiralty not upon any contract at land, but upon the merits of the ſervice at ſea, and allow or deduct the wages according to the good or bad performance of the ſervices in the voyage. Beſides, there is an act of parliament which warrants the proceedings in the court of admiralty for mariners wages: for in a parliament held in the fourteenth year of *Richard the Second*, the commons petitioned for remedy againſt great wages taken by maſters of ſhips and mariners; to which the king anſwered, * that THE ADMIRAL ſhall
* [245] appoint them to take reaſonable wages, or ſhall puniſh

(*a*) Winch, 8. See alſo Ray. 3. 858. 937. 2. Wilſ. 264. 1. Ld. Ray. 1. Vent. 146. 3. Lev. 60. 2. Show. 576. 632. 2. Ld. Ray. 1044. 1. Bac. 86. 1. Salk. 31. Stra. 405. 707. 761. Abr. 626.

them.

them *(a)*. Now the reason of the civil law, which allows the pawning of a ship for necessaries upon the high sea seems to be plain, because there may be an extraordinary and invincible necessity at sea, but not at land. So that this being a contract beyond sea and at land, the court of admiralty cannot have any jurisdiction over it; for where the *common law* cannot relieve, in such cases *the admiralty* shall not, because they are limited to acts done upon the sea and in cases of necessity; for if the law should be otherwise, the master may take up as much money as he will *(b)*. COSSART against LAWDLEY.

MR. POLLEXFEN, *contra*. That things arising upon land may be sued for in the admiralty is no new thing *(c)*; for so it is in all cases of stipulation. Mariners wages are also recoverable in that court, not by virtue of any act of parliament, but because it grows due for services done at sea, which is properly a maritime cause, though the contract for that service with the master was at land: but the principal reason why mariners wages are sued for in the admiralty, is because the ship is liable as well as the master, who may be poor and not able to answer the seamen *(d)*. 8. Mod. 194. Comy. 74. 137. 1. Ld. Ray. 398. 632. 739. 2. Ld. Ray. 1044. 1206. 1247. 1453. 1. Stra. 707. 405. 2. Stra. 858. 937. 968.

(a) The 13. *Rich.* 2. st. 1. c. 5. enacts, "That the admirals and their deputies shall not meddle from henceforth of any thing done *within the realm*, " but only of a thing done *upon the sea*, " as it had been used in the time of " *Edward the Third*." By the 15. *Rich.* 2. c. 3. it is ordained, " That all " manner of *contracts*, pleas, and quarrels, " and all other things rising within " the bodies of the counties, as well by " land as by water, and also of wreck " of the sea, the admiral's court shall " have no manner of cognizance, power, " nor jurisdiction, but the same shall be " tried by the laws of the land. Nevertheless, of the death of a man, and of a maihem done in great ships being and hovering in the main stream of great rivers, only beneath the bridges of the same rivers nigh to the sea, and in none other places of the same rivers, THE ADMIRAL shall have cognizance; and also to arrest ships in the great flotes for the great voyages of the king and of the realm; " and he shall have also jurisdiction " upon the said flotes during the said " voyages only."—These are the only two statutes respecting the admiral upon this subject; and although they take away his jurisdiction in *all* cases of *contracts* made *upon land*, yet the jurisdiction has always been allowed in cases of contracts made upon land with A MARINER to serve *for wages*, when such contract is only, in the ordinary and usual way, a mere memorandum, fixing the rate and ascertaining the wages. For the service at sea is the principal matter of consideration; this jurisdiction being permitted for the convenience of sailors. Howe *v.* Napper, 4. Burr. 1950. See also Cro. Car. 296. 1. Vent. 146. 3. Lev. 60. 2. Mod. 379. 2. Show. 86. 2. Ld. Raym. 1044. 2. Wils. 265. 6. Mod. 236.; Clay *v.* Sudgrave, 1. Salk. 33. 1. Ld. Ray. 576. But if there is a *special agreement* out of the usual form, or a charter party, or a deed for the payment of wages, made on land, the jurisdiction of the admiralty is thereby superseded. Campion *v.* Nicholas, 1. Stra. 405. See also 1. Salk. 31. 2. Mod. 239. Stra. 858.—And by the statute 2. *Geo.* 2. c. 36. made perpetual by 2. *Geo.* 3. c. 31. " No master of any " ship shall proceed on a voyage without " agreeing with the mariners for wages, " which agreement the mariners shall " sign."—If the contract, therefore, be *special* or *under seal*, the mariners cannot sue thereon for wages in the admiralty court. See Minet *v.* Robinson, Bunb. 121. 1. Com. Dig. 276.—And by 4. *Ann.* c. 16. s. 17. " All suits and " actions in the court of admiralty " for seamens wages, shall be commenced " and sued within six years next after " the cause of such suits or actions shall " accrue." See Dougl. 102. *notis.* 2. Term Rep. 651.

(b) 4. Inst. 134. Cro. Car. 603. Latch. 11. 2. Brownl. 37.

(c) 1. Roll. 530.

(d) Exton. Mant. Dicæologiæ, fo. 192.

CURIA.

COMART *against* LAWBLEY.

CURIA. Take a trial upon the neceſſity in this caſe *(a)*.

(*a*) It appears that after trial in *prohibition* a *conſultation* was awarded; and by HOLT, *Chief Juſtice*, there is in this caſe no colour for a prohibition; for the maſter may, in caſe of neceſſity, pawn the ſhip abroad, in the courſe of the voyage, though at land; and as the pawnee has no remedy at common law, it is a matter properly triable in the admiralty court. S. C. Comb. 135. S. C. Holt, 48. S. P. determined in the caſe of Johnſton *v.* Shippen, 2. Ld. Ray. 982. 6. Mod. 79. 11. Mod. 30. Salk. 35. S. P. in Benzen *v.* Jefferies, 1. Ld. Ray. 152. Stra. 695. See alſo 1. Vezey, 443. 12. Mod. 406. But it muſt appear that the hypothecation was for neceſſaries during the voyage, Juſtin *v.* Ballam, 2. Ld. Ray. 805; and that the hypothecation was made in foreign parts, Wilkins *v.* Carmicheal, Dougl. 101; for whether the court of admiralty has or has not juriſdiction depends upon the circumſtances; but if the *hypothecation bond* be given during the voyage, that court has cognizance of it, though executed on *land* and *under ſeal*, Menetone *v.* Gibbons, 3. Term Rep. 267.—See alſo Smart *v.* Wolff, that the admiralty court has juriſdiction over the queſtion of freight claimed by a neutral maſter againſt the captor who has taken the goods as prize, 3. Term Rep. 323; but the admiralty has no juriſdiction in a caſe where a veſſel is injured in the Thames, within the body of a county, Velthaſen *v.* Ormſley, 3. Term Rep. 315.

Caſe 151. Anonymous.

The Court will not order a plaintiff to file the *venire facias*.

10. Mod. 310. 3. Com. Dig. 174.

THE PLAINTIFF recovered a verdict againſt the defendant in an action upon the caſe.

The defendant now moved by his counſel, that the plaintiff ſhould file the *venire facias* and *diſtringas*, becauſe all writs which are returnable in this court ought to be filed (*a*), otherwiſe a damage may enſue to the officers, and a wrong to the king, upon the forfeitures of iſſues by the jurors, which are always eſtreated upon the coming in of the *diſtringas*.

The counſel inſiſted upon it, that it was the common law of this realm, and that it was the right of the ſubject, that all writs which iſſue out of the king's courts ſhould be filed; that the panel of the *venire facias* is part of the record; and that an attaint could not be brought againſt the jury if theſe writs were not filed, becauſe *non conſtat de perſonis*.

[246] * This matter was referred to ſome of the antient clerks of the court, and to ASTON, *the Secondary*, who reported, that the Court never ordered a plaintiff to file a *venire facias* againſt his will.

(*a*) See general rule Trinity Term 30. Geo. 3 that the *cuſtos brevium* of B. R. ſhall indorſe upon every writ on what day and what hour the ſame was filed, 3. Term Rep. 787.

Davies's Case.

Case 152.

The lord of a manor may *prescribe* for himself and his *tenants and farmers* to take fowl in the warren of another; but this right cannot be claimed by *custom*.

Post. 252. 6. Co. 59. 1. Roll. Abr. 399. Jones, 296. Yelv. 187. Cro. Jac. 256. Fitzg. 11. Mod. 72. 12. Mod. 35. 380. 2. Stra. 1224. 2. Peer. Wms. 257. Salk. 335. Cowp. 47.

TRESPASS against *Davies* and *Powel* for breaking the plaintiff's close, and chasing and killing of FOWL in his *free warren*. The DEFENDANT as to all the trespass, but chasing and killing of the fowl, pleaded *not guilty*; and as to that he sets forth, that the dean and chapter of *Exeter* were seised in fee of the manor of *Brampton*, of which the said warren was parcel, and that they and all those whose estates they had, &c. had *liberty* for themselves, their *tenants and farmers*, to fowl in the said warren; that the dean and chapter did make a lease of parcel of the said manor to the defendants for one and twenty years, reserving a rent, &c. and so they justify as tenants, &c. they did fowl in the said warren.—The plaintiff replied *de injuriâ suâ propriâ*; upon which they were at issue; and there was a verdict for the defendants.

MR. POLLEXFEN moved in arrest of judgment, Because it is an unreasonable prescription for an interest in every tenant of the manor to fowl in that *warren: it has been so ruled for a common, without saying for his cattle *levant et couchant*, for it must be for a certain number (*a*). In this case the prescription is not only in the person of the *lord*, but for all his *farmers and tenants*, who cannot prescribe to have a free warren *in alieno solo*.

E contra it was argued, That such a prescription might not be good upon a *demurrer*, but it is well enough *after a verdict* (*b*). It is not an objection to say, that this *prescription* is too large, for all *tenants*, as well *freeholders* as *copyholders*, to prescribe in the soil of another, and so there may not be enough for the lord himself; because this is a profit *à prendre in alieno solo*, and for such the tenants of a manor may prescribe by a *que estate* exclusive of the lord (*c*).

And of that opinion was THE COURT; so the defendant had his judgment.

(*a*) 1. Roll. Abr. 399.
(*b*) 3. Term Rep. 147.
(*c*) Post. 250. Yelv. 187. Cro. Jac. 256. Bean *v.* Bloom, 2. Bl. Rep. 926. 3. Wils. 456.; Weekley *v.* Wildman, 1. Ld. Ray. 405.; Selby *v.* Robinson, 2. Term Rep. 758.; Grimstead *v.* Marlowe, 4. Term Rep. 717.; Worledge *v.* Manning, 1. H. Bl. Rep. 53. *notis*; Steel *v.* Houghton, 1. H. Bl. Rep. 51.

*[247]

*Anonymous.

Case 153.

The Court will not, *on motion*, try the legality of the fees demanded by the clerks of the crown.—2. Inst. 406. 8. Mod. 189. 226. 10. Mod. 263. 157. 11. Mod. 80. 137. 12. Mod. 609. 1. Stra. 74.—189. 226.

NOTA. An information was brought in this court for the throwing down of hedges and ditches, in which there were several defendants, who pleaded specially.

ANONYMOUS. THE CLERK OF THE CROWN OFFICE demanded, for his fees in this plea, thirteen ſhillings and four-pence for every name; which came to ſeventeen pounds.

By reaſon of the great charge the defendants did not plead, but let judgment go by default.

MR. POLLEXFEN moved, that the plea might be received, and that it might be enquired what fees were due.

THE COURT would not try this upon *a motion*, but adviſed an indictment of extortion, if their clerk was guilty.

Caſe 154. The King *againſt* The Inhabitants of Malden.

A pauper cannot gain a ſettlement by forty days reſidence in a tenement under 10l. a-year, unleſs he has given notice purſuant to 1. *Jac.* 2. c. 17.

S. C. Carth. 28. S. C. 1. Show. 12. 8. Mod. 38. 170. 285. 308. 369. 10. Mod. 14. 261. 279. 293. 392. 430. 12. Mod. 441. Fitzg. 255. 1. Stra. 51. 60. 470. 579. 2. Stra. 853.

SHAW, *Serjeant*, moved to affirm an order made upon an appeal to the quarter ſeſſions of the peace for the county of *Eſſex*.

The caſe was, *viz. John Pain* ſerved an apprenticeſhip at *Malden*, where he married and had ſeveral children. His wife died; he married another woman, who had a term for years of an houſe in the pariſh of *Heybridge*, where he lived for a year, and left *Malden*. Afterwards he returned to *Malden*, was rated to the poor, and lived there two years; then he died. In a ſhort time after his death his widow and children were removed by an order of two juſtices to *Heybridge*, from which order they appeal; and by the order of ſeſſions they were declared to be inhabitants of *Malden*.

MR. POLLEXFEN now moved to quaſh it, becauſe it does not appear, that he gave any formal notice in writing to the overſeers of *Malden* when he returned from *Heybridge*, and therefore ought to be ſettled there, and not at *Malden*; for being taxed to the poor will not amount to *notice*; and he cited a ſtronger caſe, which was thus: The churchwardens of *Covent Garden* certified under their hands, that ſuch a perſon was an inhabitant within their pariſh, but becauſe no note was left with them purſuant to the ſtatute (*a*), notwithſtanding ſuch certificate * he was held to be no inhabitant within their pariſh.

* [248]

And of that opinion was ALL THE COURT (*b*).

(*a*) 1. *Jac.* 2. c. 17.

(*b*) In Rex *v.* Payne, 1. Show. 12. which appears to be the ſame caſe with the preſent, the Court held, that the being rated to and paying the poor rates was equivalent to notice, and therefore that the pauper gained a ſettlement in *Malden*, although no actual notice was given purſuant to the 1. *Jac.* 2. c. 17. And with this report agrees S. C. Carth. 28. The ſtatute of 3. *Will & Mary*, c. 11. however, ſeems to have removed all doubt upon this point; for after declaring, that the forty days reſidence ſhall be reckoned from the *publication* of the notice in writing, it expreſsly provides, "that any perſon who ſhall "be *charged with* and *pay* his ſhare "towards the public taxes, ſhall gain a "ſettlement, though no ſuch notice in "writing be delivered and publiſhed." And ſince the paſſing of this act it has been held, that no circumſtances of reſidence, however ſtrong, will amount to a *conſtructive notice*. See Mr. Conſt's edition of Bott's Poor Laws, vol. i. 124 to 126. and 219 to 227.

Anonymous.

Anonymous. Case 155.

REPLEVIN. Three persons made cognizance as bailiffs to *A.* and so justify the taking of the cattle *damage feasant* in his ground. The plaintiff replied, that the cattle were taken in his ground, and traverses the taking in the place mentioned in the cognizance. There was judgment for the defendant. Upon which a writ of error was brought.

In replevin, if the defendants, as bailiffs, make *cognizance* by *attorney*, and one of them is an *infant*, yet it cannot be assigned for *error*; for they are in nature of *plaintiffs*, and sue *in autre droit.*

The error assigned was, That one of the bailiffs was an *infant*, and made cognizance by *attorney*, when he ought to do it by *guardian*.

Mr. Pollexfen. This might be pleaded in *abatement*, but it is not *error*; for an infant administrator may bring an action of debt by *attorney*, because he sues in the right of another, and so his infancy shall be no impediment to him. The bailiff in this case is as much a plaintiff as the administrator in the other, for he makes cognizance in the right of another; and in such case, if two are of age and one is not, they who are of age may make an attorney for him who is not. So if there are two executors, one of them of age and the other not, one may make an attorney for the other (*a*). There is no difference between executors and infants in this case; for executors recover in the right of the testator, and the bailiffs in the right of him who has the inheritance. Besides, the avowants are in the nature of plaintiffs; and where-ever a plaintiff recovers, the defendant shall not assign infancy for error.

1. Roll. Abr. 288. Yelv. 58. Cro. Eliz. 378. 569. Cro. Jac. 441. 1. Vent. 102. 1. Lev. 299. 1. Mod. 296. 2. Saund. 212. 5. Mod. 209. 3. Bac. Abr. 141. 8. Mod. 25. Stra. 784.

Adjournatur (*b*).

(*a*) 1. Mod. 296. 2. Saund. 212.

(*b*) This seems to be the case of Coan *v.* Bowles, 1. Show. 165. where it is determined, that in replevin, if the defendants appear by attorney and avow as bailiffs, and one of them be an infant, it cannot be assigned for error that the infant appeared by attorney. S. C. 4. Mod. 7. S. C. Salk. 93. 265. S. C. Carth. 122. 179.

Capel *against* Saltonstal. Case 156.

INDEBITATUS ASSUMPSIT in the common pleas; in which action there were four plaintiffs; one of them died before judgment, the others recover; and now the defendant brought a writ of error in this court to reverse that judgment.

If several plaintiffs bring an action of *indebitatus assumpsit*, and one of them die before judgment, the action is thereby abated.

The question was, Whether the action was abated by the death of this person?

* Those who argued *for the plaintiffs* in the action held, that the debt will survive, and so will the action, for it is not altered

Moor, 9. 17. Carter, 193.

2. Lev. 82. 1. Vent. 235. Ray. 463. 2. Bulst. 262. Cro. Jac. 29. Cro. Car. 509. 2. Mod. 115. 8. Mod. 115. 11. Mod. 136. Prec. Chan. 13. 197. 1. Com. Dig. 55. 3. Bac. Abr. 8. 4. Bac. Abr. 41. 1. Wils. 38. 3. Peer. Wms. 195. 2. Stra. 1063.

by

CAPEL *against* SALTONSTAL.

by the death of the party; for where damages only are to be recovered in an action well commenced by several plaintiffs, and part of that action is determined by the act of God or by the law, and the like action remains for the residue, the writ shall not abate. As in *ejectment*, if the term should expire pending the suit, the plaintiff shall go on to recover damages (*a*); for though the action is at end *quoad* the possession, yet it continues for the damages after the term ended. So if the lessor bring *waste* against (*b*) tenant *pur auter vie*, and pending the writ *cestui que vie* die, the writ shall not abate, because no other person can be sued for damages but the survivor (*c*). So where *trover* was brought by two, and after the verdict one of them died, the judgment shall not be arrested, because the action survives to the other (*d*).

Ld. Ray. 329. 8. Mod. 55. 78. 10. Mod. 177. Fitzg. 83. Com. 237. 327. Stra. 1272. 12. Mod. 101.

MR. POLLEXFEN, *contra*, admitted the law to be, that where two jointenants are defendants, the death of one would not abate the writ, because the action is joint and several against them. But in all cases where two or more are to recover a personal thing, there the death or release of one shall abate the action as to the rest; though it is otherwise when they are defendants, and are to discharge themselves of a personalty: and therefore in an *audita querela* by two, the death of one shall not abate the writ, because it is in discharge (*e*). Now in this case judgment must be entered for a dead man, which cannot be, for it is not consistent with reason. The case of *Wedgewood v. Bayley* is express in it, which was this: Trover was brought by six, and judgment for them; one of them died; the judgment could not be entered. It is true, where so many are defendants and one dies, the action is not abated; but then it must be suggested on the roll.

1. Ld. Ray. 280. 341. 695. 10. Mod. 251.

CURIA. Actions grounded upon *torts* will survive, but those upon *contracts* will not.

See Hambly *v.* Trott, Cowp. 371 to 377.

The judgment was reversed (*f*).

(*a*) See Gallaway *v.* Herbert, 4. Term Rep. 680.; Syburn *v.* Slade, 4. Term Rep. 682.

(*b*) Co. Lit. 285. Cro. Eliz. 144. Savil, 28. Run. on Eject. 130.

(*c*) 5. Co. 75.

(*d*) 2. Bulst. 262. Co. Lit. 198. 1. Com. Dig. 57. Cowp. 372.

(*e*) Ruddock's Case, 6. Co. 25. Cro. Jac. 19. 1. Vent. 34. 1. Bac. Ab. 8. 4. Bac. Abr. 42.

(*f*) By 17. *Car.* 2. c. 8. the death of either of the parties between *verdict* and *judgment* shall not be alledged for error, so as judgment be entered within two Terms.—But by 8. & 9. *Will.* 3 c. 11. s. 7. "If there be two or more "plaintiffs or defendants, and one or "more of them should die, if the cause "of such action shall survive to the "surviving plaintiff or plaintiffs, or "against the surviving defendant or "defendants, the writ or action shall "not be thereby abated; but such death "being suggested on the record, the "action shall proceed at the suit of the "surviving plaintiff or plaintiffs against "the surviving defendant or defendants." See Middleton *v.* Crofts, Annally's Rep. 395.

MICHAELMAS

MICHAELMAS TERM,

The Fourth of James the Second,

IN

The Common Pleas.

Sir Edward Herbert, *Knt. Chief Justice.*
Sir Thomas Powell, *Knt.* } *Justices.*
Sir Thomas Jenner, *Knt.* }
Sir Thomas Powis, *Knt. Attorney General.*
Sir William Williams, *Knt. Solicitor General.*

* Fisher *against* Wren. Case 157.

THE PLAINTIFF brought an action of trespass on the case, and declared that he was seised of an ancient messuage, and of a meadow, and an acre of land parcel of the demesnes of the manor of *Crosthweit*; and sets forth *a custom* to grant the same by copy of court roll; and that there are several freehold tenements parcel of the said manor, and likewise several customary tenements parcel also thereof, grantable at the will of the lord; and that all the freeholders, &c. time out of mind, &c. together with the copyholders according to the custom of the said manor have enjoyed *solam et separalem pasturam* of the ground called *Garths*, parcel of the said manor, for their cattle *levant et couchant*, *&c.* and had liberty to cut the willows growing there for the mending of their houses; and the defendant put some cattle into the said ground called *Garths*, which did eat the willows, by reason whereof the plaintiff could have no benefit of them, &c. Upon not guilty pleaded, there was a verdict for the plaintiff.

Quære, If a *prescription* that all the freeholders of a manor, together with the copyholders, according to *the custom of the said manor*, have enjoyed a sole and separate pasturage in a certain ground parcel of the manor, be good?
Ante, 245.
2. Lev. 2.
Pollexf. 13.
1. Mod. 74.
2. Saund. 326.
10. Mod. 158. 228. 300.
12. Mod. 73.
1. Ld. Ray. 58. 83. 273.
2. Ld. Ray. 1032.
3. Ter. Rep. 147.

PEMBERTON, *Serjeant*, now moved in arrest of judgment; and took these exceptions.

FIRST, As to the manner of the *prescription*, which the plaintiff had laid to be in the *freeholders*, and then alledged *a custom* for the *copyholders*, *&c.* and so made a joint title in both, which cannot be

FISHER *against* WREN. be done in the same declaration, because *a prescription* is always alledged to be in a *person*, and *a custom* must be limited to *a place*, and therefore an entire thing cannot be claimed both by *a prescription* and *custom*, because the grant to the freeholders and this usage amongst the copyholders could not begin together *(a)*.

SECONDLY, As to the custom, it is not good, as pleaded, to exclude the lord; for it can never have a good commencement, because copyholders have common in the lord's soil only by permission to improve their estates, which common being spared by the lord and used by the tenant becomes a custom; but no usage amongst the tenants, or permission of the lord, can wholly divest him of his soil, and vest an interest in them who in the beginning were only his tenants at will *(b)*.

*[251]

10. Mod. 316. 12. Mod. 86. 96. 301. 657. Ld. Ray. 312. 341. 737.

* THIRDLY, The exception on which he chiefly relied was, *viz.* that this is a profit *à prendre in alieno solo*, to which all the tenants of the manor are entitled, and that makes them tenants in common; and therefore in this action, where damages are to be recovered, they ought all to join. It is true, in real actions tenants in common always sever, but in trespasses *quare clausum fregit*, and in personal actions, they always join *(c)*; and the reason is plain, because in those actions though their estates are several, yet the damages survive to all, and it would be unreasonable to bring several actions for one single trespass.

10. Mod. 280. 335. 11. Mod. 218. Fitzg. 189. Comyns, 422. 561. Stra. 425. 496.

E contra it was argued, That it cannot be denied, but that there may be a custom or prescription to have *solam et separalem pasturam*. But whether both *prescription* and *custom* can be joined together, is the doubt now before the Court; and as to that he held it was well enough pleaded, for where there is an unusual right, there must be the like remedy to recover that right; it was thus pleaded in *North's Case (d)*.

But admitting it not to be well pleaded, it is then but a double plea, to which the plaintiff ought to have demurred *(e)*; and this may serve for an answer to the first exceptions.

Then as to the last objection, that it is a profit *à prendre in alieno solo* for which all the tenants ought to join; it is true, a common is no more than a profit *à prendre*, &c. yet one commoner may bring an action against his fellow: besides, in this case they are not tenants in common, for every man is seised severally of his freehold.

Adjournatur.

(a) Vaugh. 215. Carter, 200. 1. Saund. 351.

(b) 2. Saund. 325.

(c) Co. Lit. 197, 198. Goldsb. 347.

(d) 1. Saund. 347. 351. 1 Vent. 383.

(e) 2. Roll. Rep. 306. Lutw. 4. Poph. 113. 1. Lev. 76. Salk. 219. 678.; but by 4. *Ann.* c. 16. s. 6. any defendant or tenant in any action or suit, or any plaintiff in replevin in any court of record, may, with leave of the Court, plead as many several matters as he shall think necessary for his defence. See 2. Burr. 754. 4. Term Rep. 701.

Ayres

Ayres *against* Huntington. Case 158.

A SCIRE FACIAS was brought upon a recognizance of a thousand pounds to shew cause why the plaintiff should not have execution *de prædictis mille libris recognitis juxta formam recuperationis*; where it should have been *recognitionis præd.*

Amendment of the word *recuperatio* for *recognitio* after a demurrer.

And upon a demurrer it was held, that the words "*juxta formam recuperationis*" were surplusage.

The record was amended; and a rule that the defendant should plead over.

Ante, 235. Stra. 1220. 1. Wils. 98. 1. Barnes, 6. 8. Mod. 313. 10. Mod. 112. 273. 306. 11. Mod. 139. Cowp. 407. 425. 841. Dougl. 115. 1. Term Rep. 782.

* Mather and Others *against* Mills. Case 159.

THE DEFENDANT entered into a bond "to acquit, discharge, and "save harmless" a parish from a bastard child. Debt was brought upon this bond; and, upon *non damnificatus* generally pleaded, the plaintiff demurred.

To debt on bond "to acquit, "discharge, "and save "harmless," the defendant may plead *non damnificatus* generally.

TREMAINE held the demurrer to be good; for if the condition had been only "to save harmless, &c." then the plea had been good; but it is likewise "to acquit and discharge, &c." and in such case *non damnificatus* generally is no good plea, because he should have shewed how he did acquit and discharge the parish, and not answer the damnification only.

E CONTRA it was argued, That if the defendant had pleaded that he kept harmless and discharged the parish, such plea had not been good, unless he had shewed how, &c. because it is in the affirmative (*a*); but here it is in the negative, *viz.* that the parish was not damnified, and they should have shewed a breach; for though in strictness this plea does not answer the condition of the bond, yet it does not appear upon the whole record, that the plaintiff was damnified; and if so, then he has no cause of action.

Judgment for the defendant.

2. Co. 3. Keilw. 80. 1. Leon. 71. 5. Mod. 243. 8. Mod. 106. 318. 349. 10. Mod. 227. 384. 443. 11. Mod. 78. 12. Mod. 406. 413. Gilb. E. R. 253. 1. Stra. 231. 400. 681. 1. Ld. Ray. 106. 124. 597. 664. 2. Ld. Ray. 968. 1140. 1416. 2. Wils. 5. 126. 5. Com. Dig. "Pleader" (2 W 33.). 4. Bac. Abr. 94. Cowp. 47.

(*a*) Codner *v.* Dalby, Cro. Jac. 363. 2. Co. 4. 2. Saund. 83. See 5. Mod. 244. 1. Bac. Abr. 548.

Memorandum. Case 160.

AFTER the close of the Term in this Vacation KING JAMES privately departed from *Whitehall*, and was stopped in *Kent*, and came back to *Whitehall*; but in two or three days after he returned to *Rochester*, and then departed secretly beyond sea.

James the Second leaves the kingdom.

Skin. 271.

TRINITY TERM,

The First of William and Mary,

IN

The King and Queen's Bench.

KING'S BENCH.
Sir John Holt, *Knt. Chief Justice.*
Sir William Dolben, *Knt.*
Sir Will. Gregory, *Knt.* } *Justices.*
Sir Giles Eyre, *Knt.*

COMMON PLEAS.
Sir Henry Pollexfen, *Knt. Chief Justice.*
Sir Thomas Powell, *Knt.*
Sir Thomas Rokeby, *Knt.* } *Justices.*
Sir Peyton Ventris, *Knt.*

EXCHEQUER.
Sir Edward Atkins, *Knt. Chief Baron.*
Sir Edward Nevil, *Knt.*
Sir Nicholas Lechmere, *Knt.* } *Barons.*
Sir John Turton, *Knt.*

Sir George Treby, *Knt. Attorney General.*
John Somers, *Esq. Solicitor General.*

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* Memorandum, Case 161.

THAT on the 4th day of *November* last past, THE PRINCE OF ORANGE landed here with an army, and by reason of the *abdication* of the government by KING JAMES, and the posture of affairs, there was no *Hilary Term* kept.

Kellow *against* Rowden. Case 162.

Trinity Term, 1. Will. & Mary, Roll 796

DEBT by *Walter Kellow*, executor of *Edward Kellow*, against *Richard Rowden.*

Where the reversion in fee is expectant upon an estate tail, and that being spent it descends upon a collateral heir, he must be sued as heir to him who was last actually seised of the fee, without naming the intermediate remainders.—S. C. 3. Lev. 286. S. C. Carth. 126. S. C. 3. Salk. 178. S. C. 1. Show. 244. S. C. Holt, 71. 336. Ante, 152. Cro. Car. 151. Bendl. 205. Dyer, 344. 1. Salk. 355. 5. Com. Dig. "Pleader" (2 E 2.). 1. Vern. 180. 2. Vern. 58. 536. 1. Peer. Wms. 176. 2. Powel on Contracts, 107. 3. Bac. Abr. 29. 33. 1. Term Rep. 438.

KELLOW *against* ROWDEN.

The case was thus: *John Rowden* had issue two sons, *John* and *Richard*. *John* the father being seised in fee of lands, &c. made a settlement to the use of himself for life; the remainder to *John* his eldest son in tail male; the remainder to his own right heirs. The father died; the reversion descended to *John* the son; who also died, leaving issue *John* his son, who died without issue; so
[254] that the estate tail was spent. * *Richard* the second son of *John* the elder entered. And an action of debt was brought against him, as son and heir of *John* the father, upon a bond of one hundred and twenty pounds entered into by his father; and this action was brought against him without naming the intermediate heirs, *viz.* his brother and nephew.

The defendant pleaded, *quòd ipse, de debito præd. ut filius et hæres præd.* JOHANNIS ROWDEN *patris sui, virtute scripti obligatorii præd. onerari non debet, quia,* PROTESTANDO *quòd scriptum obligatorium præd. non est factum præd.* JOHANNIS ROWDEN, *pro placito idem* RICHARDUS *dicit, quòd ipse non habet aliquas terras seu tenementa per discensum hæreditarium de præd.* JOHANNE ROWDEN *patre suo in feodo simplici, nec habuit die exhibitionis billæ præd.* WALTERI *præd. nec unquam postea; et hoc paratus est verificare; unde petit judicium si ipse, ut filius et hæres præd.* JOHANNIS ROWDEN *patris sui, virtute scripti præd. onerari debeat, &c.*

The plaintiff replied, that the defendant *die exhibitionis billæ præd. habuit diversas terras et tenementa per discensum hæreditarium à præd.* JOHANNE ROWDEN *patre suo in feodo simplici, &c.*

Upon this pleading they were at issue at the assizes in *Wiltshire*.

THE JURY found a special verdict, *viz.* that *John Rowden*, the father of *Richard* (now the defendant), was seised in fee of a messuage and twenty acres of land in *Bramshaw* in the said county, and, being so seised, had issue *John Rowden* his eldest son, and the defendant *Richard*; that on the 22d of *January* 18. *Car.* 1. *John* the elder did settle the premises upon himself for life, remainder *ut supra, &c.*; that after the death of the father *John* his eldest son entered and was possessed in fee tail, and was likewise entitled to the reversion in fee, and died in the 14th year of *King Charles the Second*; that the lands did descend to another *John* his only son, who died 35th *Car.* 2. without issue, whereupon the lands descended to the defendant as heir of the last mentioned *John*, who entered before this action brought, and was seised in fee, &c. But whether upon the whole matter the defendant has any lands by descent from *John Rowden* in fee simple, the jury do not know, &c.

The Counsel on both sides agreed that this land was chargeable with the debt (*a*); but the question was, Whether the issue was

(*a*) Post. 257. 3. Lev. 286. 1. Show. 244. Carth. 127. 1. Roll. Abr. 269. Hob. 48. Co. Lit. 374. 1. Salk. 242. Stra. 1270. 2. Wils. 49.; and 3. *Will. & Mary*, c. 14.

found

found for the defendant, in regard the plaintiff did not name the intermediate heirs? KELLOW *against* ROWDEN.

It was argued, that the defendant ought to be sued as immediate heir to his father, and not to his nephew, for whoever claims by descent must claim from him who was last actually seised of the *freehold* and *inheritance*; this is the express doctrine of my *Lord* * *Coke* in his *First Institute* (*a*); and if so, the defendant must be charged as he claims. *Seisin* is a material thing in our law, for if I am to make a title in a real action, I must lay an actual seisin in every man; it is so in FORMEDONS *in descender* and *remainder*, in both which you are to run through the whole pedigree (*b*). But none can be *filius et hæres* but to him who was last actually seised of the fee-simple (*c*); and therefore the brother being tenant in tail, and his son the issue in tail, in this case they were never seised of the fee, for that was expectant upon the estate tail, which being spent, then *John* the father was last seised thereof, and so his son is justly and rightly sued as son and heir. In some cases the persons are to be named, not by way of *a title*, but as *a pedigree*; as where there was tenant for life, the reversion in fee to an idiot, and an uncle who was right heir to the idiot levied a fine, and died living the idiot, leaving issue a son named *John*, who had issue *William*, who entered, the question was, Whether the issue of the uncle shall be barred by this fine? It was the opinion of two Judges (*d*), that they were not barred, because the uncle died in the life-time of the idiot, and nothing attached in him; and because the issue claim in a collateral line, and do not name the father by way of title, but by way of pedigree: but JONES, *Justice*, who has truly reported the case (*e*), was of opinion, that the issue of the uncle were barred, because the son must make his conveyance from the father by way of title. The jury have found that the reversion did descend to the defendant, as heir to the last *John*; it is true, it descends as a reversion, but that shall not charge him as heir to the nephew (*f*), for the other was seised of the estate tail, which is now spent, and the last who was seised of the fee was the father, and so the defendant must be charged as his heir. It is likewise true, that where there is an actual seisin, you must charge all, but in this case there was nothing but a reversion.

* [255]

10. Mod. 362. 367. 1. Ld. Ray. 202. 829. 2. Stra. 1012.

TREMAINE, *Serjeant*, *for the defendant*. In this case the plaintiff should have made a special declaration, for the estate tail and the reversion in fee are distinct and separate estates. * *John* the nephew might have sold the reversion and kept the estate tail; if he had acknowledged a statute or judgment, it might have been * [256]

(*a*) Co. Lit. 11.
(*b*) Year Book 8. *Edw.* 3. pl. 13. Brook's Abr. "Assize," 6. Fitz. Nat. Brev. 212. f.
(*c*) Co. Lit. 14. b.
(*d*) In the case of Edwards *v.* Rogers, Cro. Car. 524. March, 94. See also Cruise on Fines, 159.
(*e*) Jones, 456.
(*f*) Jenks' Case, Cro. Car. 151. See also Bull. N. P. 176. 300. 2. Black. Rep. 1090.

 extended

KELLOW against ROWDEN.

extended; and, if so, then he had such a seisin that he ought to have been named. If a man become bound in a bond and die; and debt is brought against the heir; it is not common to say that he had nothing by descent, but only a reversion expectant upon an estate tail (*a*). In the case of *Chappel v. Lee* (*b*), covenant was brought in the common pleas against *Judith*, daughter and heir of *Robert Rudge*; she pleaded "*riens per descent*;" issue was tried before SIR FRANCIS NORTH, *Chief Justice*; and it appearing upon evidence that *Robert* had a son named *Robert*, who died without issue, a case was made of it, and judgment was given for the defendant; the plaintiff took out a new original, and then the land was sold, so the plaintiff lost his debt.

Adjournatur.

Afterwards in *Hilary Term* the second of *William and Mary*, judgment was given for the plaintiff, by the opinion of THREE JUSTICES against EYRE, *Justice*, who argued that the defendant cannot be charged as immediate heir to his father: it is true, the lands are assets in his hands, and he may be charged by a special declaration (*c*). In this case the intermediate heirs had a reversion in fee, which they might have charged either by statute, judgment, or recognizance; they were so seised, that if a writ of right had been brought against them, they might have joined THE MISE upon the mere right, which proves they had a fee; and though it was expectant on an estate tail, yet the defendant claiming the reversion as heir, ought to make himself so to him who made the gift (*d*). The person who brings a FORMEDON *in descender* must name every one to whom any right did descend, otherwise the writ will abate (*e*). A man who is sued as heir, or who entitles himself as such, must shew how heir. The case of *Duke v. Spring* (*f*) is much stronger than this; for there debt was brought against the daughter, as heir of *B.* she pleaded *riens per descent*, and the jury found that *B.* died seised in fee, leaving issue the defendant and his wife then with child, who was afterwards delivered of a son, who died within an hour; and it was adjudged against the plaintiff, because he declared against the defendant as daughter and heir of the father, * when she was sister and heir of the
[257] brother, who was last seised.

But THE OTHER THREE JUDGES were of a contrary opinion. The question is not, Whether the defendant is liable to this debt? but, Whether he is properly charged as heir to his father? or, Whether he should have been charged as heir to his nephew, who was last seised? It must be admitted, that if the lands had descended to the brother and nephew of the defendant in fee, that then they ought

(*a*) 3. Bac. Abr. 31.
(*b*)
(*c*) Dyer, 368. pl. 460.
(*d*) Ratcliffe's Case, 3. Co. 42.
(*e*) 8. Co. 88. Fitz. N. B. 220. Rastal's Ent. 375.
(*f*) 2. Roll. Abr. 709. See also Chamgernon v. Godolphin, Cro. Jac. 161.

to

to have been named; but they had only a reverſion in fee expectant upon an eſtate tail, which was uncertain, and therefore of little value: now, though *John* the father and ſon had this reverſion in them, yet the eſtate tail was known only to thoſe who were parties to the ſettlement. It is not the reverſion in fee, but the poſſeſſion which makes the party inheritable; and therefore where lands were given to huſband and wife in tail, the remainder to the right heirs of the huſband; then they had a ſon, and the wife died, and the huſband had a ſon by a ſecond venter, and died; the eldeſt ſon entered and died without iſſue, and his uncle claimed the land againſt the ſecond ſon, but was barred, becauſe he had not the remainder in fee in poſſeſſion; and yet he might have ſold or forfeited it (*a*). But here the reverſion in fee is now come into poſſeſſion, and the defendant has the land as heir to his father; it is aſſets only in him (*b*), and was not ſo either in his brother or nephew, who were neither of them chargeable, becauſe a reverſion expectant upon an eſtate tail is not aſſets.

KELLOW *againſt* ROWDEN.

Judgment was given for the plaintiff.

(*a*) Bro. Abr. "Deſcent," pl. 30. 37. Aſſize, pl. 4.

(*b*) Prec. Chan. 39. 127. 136. 232. 1. Vern. 93. 188. 234. 282. 348. 419. 429. 471. 2. Vern. 52. 62. 106. 248. 319. 719. 9. Mod. 176. 10. Mod. 18. 334. 487. 11. Mod. 5. 1. Peer. Wms. 34. 2. Peer. Wms. 364. 3. Peer. Wms. 9. 166. 217. 341. 401. 1. Stra. 665. 2. Stra. 1028. 1270.

MICHAELMAS

MICHAELMAS TERM,

The Firſt of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir William Dolben, *Knt.*
Sir William Gregory, *Knt.* } *Juſtices.*
Sir Giles Eyre, *Knt.*

Sir George Treby, *Knt. Attorney General.*
John Somers, *Eſq. Solicitor General.*

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* Young *againſt* The Inhabitants of Totnam. Caſe 163.

A declaration on the ſtatutes of HUE AND CRY is good *after verdict*, although it is not ſtated that the *pariſh* was in the *hundred*, or that the robbery was committed on the *highway*, or in the *day-time*.

S. C. 1. Show. 60.
S.C. Comb. 150.
S. C. Carth. 71.
2. Leon. 12. 175.
3. Lev. 320.
Owen, 7.

AN ACTION was brought againſt *the hundred* for a robbery, in which the plaintiff declared, that he was robbed *apud quendam locum prope* FAIR MILE GATE, in ſuch a pariſh. He had a verdict.

TREMAINE, *Serjeant*, now moved in arreſt of judgment; and exceptions taken were theſe:

FIRST, That it does not appear that the pariſh mentioned in the declaration was in the hundred.

SECONDLY, Neither does it appear that the robbery was committed in the highway.

THIRDLY, The plaintiff has not alledged that it was done in the day-time; for if it were not, the hundred is not liable by law.

But theſe exceptions were all diſallowed, becauſe it being *after a verdict* (*a*), the Court will ſuppoſe that there was evidence given of theſe matters at the trial; ſo the plaintiff had his judgment.

1. Mod. 221. 11. Mod. 8. 12. Mod. 242. Comyns, 327. 345. 478. 1. Stra. 406. 2. Stra. 1011. 1170. 1247. 1. Peer. Wms. 412. 437. 5. Com. Dig. "Pleader" (2 S 5.). Salk, 624. 3. Salk. 184. 2. Ld. Ray. 826. 3. Bac. Abr. 68.

(*a*) Ante, 162. 10. Mod. 300.

Eggleſton

Case 164. **Eggleston and Another *against* Speke *alias* Petit.**

Trinity Term, 1. *Will. & Mary*. *Roll* 249.

The answer of a *guardian* to a bill in chancery against his ward cannot be read in evidence in a court of law to conclude *the infant*.

THIS was a trial at THE BAR, by a *Wiltshire jury*, in an ejectment brought by the plaintiffs as heirs at law to *Ann Speke*, who died seised in fee of the lands in question.

Upon not guilty pleaded, this question arose at the trial, Whether the answer of a guardian in chancery shall be read as evidence in this court to conclude the infant? there being * some opinions that it ought to be read; and the defendant's counsel insisting on the contrary.

* [259]

S. C. 1. Show. 89. S.C. Carth. 79. S.C.Comb. 156. 2. Vent. 72. Ld. Ray. 311. Prec. Ch. 229. Abr. Eq. 281. 1. Peer. Wms. 344. 3. Bac. Abr. 148. 3. Bro. Cas. Parl. 1.

EYRES, *Justice*, being the puisne Judge, was sent to the court of common pleas, then sitting, to know their opinions; who returning made this report, " That the Judges of that court " were all of opinion, that such answer ought not to be read as " evidence, for it was only to bring the infant into court, and to " make him a party."

Inquisitions and heralds books admitted to prove pedigree. 3. Term Rep. 709. 4. Term Rep. 514.

THEN the plaintiffs proceeded to prove their title as heirs at law, *viz*. by several inquisitions which were brought into court, and by the *Heralds Office*.

A will *disposing* of lands, though attested by three witnesses, is not a revocation of a former will within the words 29. *Car*. 2. c. 3. " or other writing declaring " the same," unless the attestation be in the presence of the testator, although it expressly revokes all former wills. Ante, 218.

The defendant's title likewise was thus proved, *viz*. That the *Lady Speke* being seised in fee, &c. did by will, dated in *March* 1682, devise the lands to *John Petit* for life, remainder to the defendant and his heirs for ever; that the *Lady Speke* died so seised; that *John Speke* the tenant for life, and father to the defendant, was also dead, &c. This will was proved by several witnesses, one of whom likewise deposed that my *Lady Speke* made two other wills subsequent to this now produced; and a minister proved that she burnt a will in the month of *December*, which was in the year 1685. Then the plaintiffs produced another will made by her at *Christmas* 1685, attested by three witnesses, but not in the presence of my lady; so that though it might not be a good will to dispose the estate, yet the Counsel insisted that it was a good revocation of the other, for it is *a writing* sufficient for that purpose, within the sixth paragraph of the statute 29. *Car*. 2. c. 3. of Frauds, which enacts, " THAT all devises of lands shall be in writing, and signed " by the party so devising the same, or by some other person in his " presence, and by his express direction, and shall be attested and " subscribed, in the presence of the said devisor, by three or four " credible witnesses, or else shall be utterly void and of none " effect. AND THAT no devise in writing of lands, tenements,

2. Vern. 742. Eq. Cas. 130. 3. Lev. 87. 3. Burr. 1244. 1253. 2. Atk. 272. 1. Eq. Ca. Abr. 409. 3. Ch. Rep. 83. Powel on Dev. 632. 648. 1. Bl. Rep. 347. 4. Burr. 2513. 1. Peer. Wms. 344.; and see the case of Ellis v. Smith, F. Vezey's Rep. 11.

" or

"or hereditaments, nor any clause thereof, shall be revocable "otherwise than by some other will or codicil in writing, or *other* "*writing declaring the same*, or by burning, cancelling, tearing, "or obliterating the same, by the testator himself, or in his pre- "sence, and by his direction and consent; but all devises and be- "quests of lands shall remain and continue in force until the same "be burned, torn, cancelled, or obliterated by the testator or his "directions, in manner aforesaid; or unless the same be altered by "some other will or codicil in writing, or other writing of the "devisor, signed in the presence of three or four witnesses de- "claring the same." The case of *Sir George Sheers* (*a*) was now mentioned, whose will was carried out of the chamber where he then was into a lobby, and signed there by the witnesses; but one of them swore that there was a window out of that room to his chamber, through which the testator might see the witnesses as he lay in his bed.

EGLESTON AND ANOTHER *against* SPEKE ALIAS PETIT.

A will of lands signed and published by the testator in the presence of three witnesses, but not attested by them in the presence of the testator, is void.

THE JURY, upon this evidence, found this special verdict, *viz.* hat *Ann Speke* being seised in fee, &c. did, on the 12th day of *March* 1682, make her will, and devised the lands to *John Petit* for life, and afterwards to *George* his son, and to his heirs for ever, upon condition that he take upon him the name of *Speke*; that the 25th of *December* 1685, she caused *another writing* to be made, purporting to be her will, which was signed, sealed, and published by her, in the presence of three witnesses, in the chamber where she then was, and where she continued whilst the witnesses subscribed their names in the hall, but that she could not see them so subscribing (*b*). * They find that the lessors of the plaintiff are heirs at law, and that they did enter, &c.

*[260]

S. C. 1. Show. 89.
S. C. Carth. 79.
S.C.Comb.156.
Ante, 218.
Eq. Caf. 130.
Prec. Ch. 460.
Eq. Ca. Abr. 409.
4. Burr. 2514.

This matter was argued in *Easter Term* following.

The question was, Whether this writing purporting a will, was a revocation of the former or not? and that depended upon the construction of 29. *Car.* 2. c. 3. s. 6. the statute of Frauds. Now the want of witnesses does not make the last will void in itself, but only *quoad* the lands therein devised; it has its operation as to all other purposes. It must therefore be a revocation of the former; and this is agreeable to the resolution of the Judges in former times; for there being nothing in the statute of Wills, 32. *Hen.* 8. c. 1. which directs what shall be a revocation, the Judges in *Trevilian's Case* (*c*) did declare that it might be by word of mouth, or by the very intention of the testator to alter any thing in the will, for before the late statute very few words did amount to a revocation. If lands are devised and afterwards a feoffment is made of the same, but for want of livery and seisin it is defective, yet this is a revocation of the will, though the feoffment is void (*d*).

(*a*) Carth, 81. 2. Salk. 688.
(*b*) See Machil *v.* Temple, 2. Show. 288.; Broderick *v.* Broderick, 1. Peer. Wms. 239.; Longford *v.* Eyre, 1. Will. 740.; Carter *v.* Price, Dougl. 241.; Hands *v.* James, Comyns' Rep. 531.; Onyons *v.* Tyrer, 1. Peer. Wms. 343.; Casson *v.* Wade, 1. Brown C. C. 99.
(*c*) Dyer, 143.
(*d*) Moor, 429. 1. Roll. Abr. 614. to 616.

The

Eccleston and Another against Speke alias Petit.

The Counsel *on the other side* argued, that this will was not void by any clause in the statute of Frauds, for if this is a revocation within that statute, then this second writing purporting a will, must be a good will; for if it is not a good will, then it is not a good revocation within that law. No man will affirm that the latter writing is a good will; therefore the first, being a devise of land, cannot be revoked but by a will of land, which the second is not. This statute was intended to remedy the mischief of parol revocations, and therefore made such a solemnity requisite to a revocation. It cannot be denied, but that this latter writing was intended to be made a will; but it wanting that perfection which is required by law, it shall not now be intended a writing distinct from a will, so as to make a revocation within the meaning of that
* [261] act. * If a man has a power of revocation, either by will or deed, and he makes his will in order to revoke a former, this is a writing presently, but it is not a revocation as long as the person is living. Therefore a revocation must not only be by a writing, but it must be such a writing as declares the intention of a man that it should be so, which is not done by this writing.

Upon the first argument, judgment was given for the defendant, that the second will must be a good will in all circumstances to revoke a former will.

Case 165. Cross *against* Garnet.

An action for deceit in selling goods, affirming them to be his own, when in truth they belonged to another, is good *after verdict*, without alledging a *warranty* that they were his own, or that *he knew* them to be another's, or that he sold them *fraudulently and deceitfully*.

S. C. 1. Show. 68.

THE PLAINTIFF declared, that on such a day and year there was a discourse between him and the defendant concerning the sale of two oxen, then in the possession of the defendant, and that they came to an agreement for the same; that the defendant did then sell the said oxen to the plaintiff, and did falsly affirm them to be his own, *ubi revera* they were the oxen of another man. The plaintiff had a verdict.

THOMPSON, *Serjeant*, moved in arrest of judgment, that the declaration was not good, because the plaintiff has not alledged that the defendant did affirm the cattle to be his own *sciens* the same to be the goods of another, or that he sold them to the plaintiff *fraudulenter et deceptivè*, or that there was any *warranty*; for this action will not lie upon a bare communication.

But notwithstanding these exceptions the plaintiff had his judgment. It might have been good upon *demurrer*, but *after verdict* it is well enough (*a*).

S. C. Carth. 90. S. C. Comb. 142. S. C. Holt, 5. 1. Roll. Abr. 91. Moor, 126. Cro. Eliz. 44. Yelv. 20. 1. Roll. Rep. 275. Cro. Jac. 474. 1. Sid. 146. 10. Mod. 142. 12. Mod. 345. 1. Ld. Ray. 284. 408. 593. 669. 2. Ld. Ray. 1118. 1. Salk. 211. 210. 1. Com. Dig. 166. 172. 1. Stra. 414. Dougl. 656. 3. Term Rep. 51.

(*a*) The declaration regularly ought to charge, that the defendant *knew* of the matter by which he deceived, and that he did it *falsely and fraudulently*, 1. Com. Dig. "Action of Deceit" (F 2.); but this may be supplied by matter *tantamount*, Michael *v.* Alestree, 2. Lev. 172. And after verdict *falsely and fraudulently* import, that he *knew* it, Danv. 178.; and *scienter* will supply the omission of *falsely and fraudulently*, Leakins *v.* Chisel, 1. Sid. 146.

* Lea *against* Libb. Case 166.

Hilary Term, 2. & 3. Will. & Mary. Roll 497.

EJECTMENT for lands in *Hampshire*. The jury found a special verdict, the substance of which was: That the lessor of the plaintiff was heir at law to one *John Denham* his ancestor, who, being seised in fee of the lands in question, did, by will bearing date the 28th day of *January* in the year 1678, devise the same to the defendant, which he subscribed and published in the presence of two witnesses, and they likewise attested it in his presence; that on the 29th day of *December* 1679, he made another will or codicil in writing, reciting that he had made a former will, and confirming the same, except what was excepted in the codicil, and declared his will to be, that the codicil should be taken and adjudged as part of his will; that he published this codicil in the presence likewise of two witnesses, one of which was witness to the first will, but the other was a new man; and they further find, that these were distinct writings, &c.

If there be two witnesses to a will of lands, and two to a codicil confirming the will, one whereof was a witness to the will, yet these are not three sufficient witnesses to the will itself, within the 29. *Car.* 2. c. 3.

S. C. 1. Eq. Abr. 402. S. C. 1. Show. 68. 88. S. C. 3. Salk. 395. S. C. Comb. 174. S. C. Carth. 35. S. C. Rep. Eq. 263. S. C. Holt, 742. Dyer, 53. 72. Carth. 514. Gilb. E. R. 255. Comyns, 197. 381. 451. 531. 2. Vern. 209. 498. 598. 625. 722. 1. Peer. Wms. 740. 2. Peer. Wms. 75. 236. 258. 3. Peer. Wms. 254. 12. Mod. 37. Prec. Chan. 185. Skin. 227. 2. Vezey, 254. 2. Atk. 176. 2. Vern. 598. Stra. 1109. Com. Rep. 90. 3. Com. Dig. "Devise" (E 1.). 5. Bac. Ab. 504. 1. Bl. Rep. 407. 2. P. Wms. 509. Cowp. 49.

The question was, Whether this was a good will attested by three witnesses? since one of the witnesses to the codicil was likewise a witness to the will; so that the new man (if any) must make the third witness.

THOMPSON, *Serjeant*, argued, that it was not a good will. The clause of the statute 29. *Car.* 2. c. 3. is, "That all devises of "lands shall be in writing, and signed by the testator in the "presence of three witnesses, and they to attest it in his presence." But here are not three subscribing witnesses in the presence of the testator; so that the first will must be void; for one of the witnesses to the codicil did never see that will. Besides, the codicil is not the same thing with the will; it is a confirmation of it; and this being in a case wherein an heir is to be disinherited, ought not to have a favourable construction.

THE ATTORNEY GENERAL *contra*. A will may be contained in several writings, and yet but one entire will (*a*). It is true, if it be attested only by two witnesses it is not good; but if the testator call in a third person, and he attest that individual writing in his presence, this is a good will, though the witnesses were not all present together, and at the same time; for there is the credit of * three persons to such a will, which is according to the intent of the statute. And therefore it cannot be objected that these are distinct wills, or that the papers are not annexed, for no such thing is required by law; for a man may make his will in several sheets of paper, and if the witnesses subscribe the last sheet it is well enough; or if he doth put up all the sheets in a blank piece of paper, and the witnesses attest that sheet, it is a good will. In these cases the intent of the law-makers must and ought to be

* [263]

(*a*) See 2. Black. Com. 410. Powel on Devises, 90.

chiefly

LEA *against* LIBB.

chiefly regarded, and for what reasons and purposes such laws were made, and what judgments have been given in parallel cases. If a man grant a rent change to his youngest son for life, and afterwards devise that he shall have the rent as expressed in the grant; now though the writing was no part of the will, but of another nature, yet the will referring to the deed is a good devise of the rent charge within the statute of Wills (*a*). But in this case the codicil is part of the will; it is of the same nature; and being made *animo testandi*, the end of the statute is performed; for both will and codicil joined together make a good devise: the first was a will to all purposes; it only wanted that circumstance of a third witness to attest it, which the testator completed after by calling in of a third person for that purpose.

CURIA. If a man make a will in several pieces of paper, and there are three witnesses to the last paper, and none of them did ever see the first, this is not a good will (*b*).

Afterwards in *Hilary Term* judgment was given that this was not a good will.

(*a*) Molineux *v.* Molineux, Cro. Jac. 144. 1. Roll Abr. 461 614. 2 Roll. Abr. 253. See also Powel on Devises, 22.

(*b*) See the case of Attorney General *v* Barnes, Prec. Chan. 270. 3. Chan. Rep. 151. 2. Vern. 597., Bond *v.* Seawell, 3. Burr 1173. and Black Rep. 407. 422. 454, Purphrase *v.* Lansdowne, Com Rep. 384.; Carlton *v.* Griffin, 1. Burr. 548., Jones *v.* Dale, 1. Bar. 130. 5. Bac. Abr. 505. 511.; Dormer *v.* Thurland, 2 Peer. Wms. 507., Lilis *v.* Smith, F. Vezey's Rep. 11.

Case 167.

Tippet *against* Hawkey.

In covenant, if the interest of the parties be several, each must bring a several action.

TIPPET the elder and his son covenant with *John Hawkey* to sell and convey land to him free from all incumbrances, and that they will levy a fine, &c. and deliver up writings: "ITEM, "it is agreed between the parties" that the said *Hawkey* shall pay to *Tippet* the younger so much money, &c. The action is brought in the name of both.

Yelv. 177. Skin. 401. 5. Co 19. 3. Leon. 161. Cro Eliz. 408. 1. Sho. 8. Moor, 847.

Upon a demurrer to the declaration it was held ill, for the duty is vested in *Tippet* the younger, and he only ought to have brought this action.

Judgment for the defendant.

Stra 553. 1146. 8. Mod. 166 242 205 2 Ld Ray. 1381. 5. Com. Dig. "Pleader" (2 V 2.). 1. Term Rep. 22. 3. Term Rep. 433. 779.

*[264]

Case 168.

* Rees *against* Phelps.

An award of *general releases* extends only to matters depending at the time of the submission

DEBT UPON A BOND conditioned for performance of *an award.* Upon *nullum fecerunt arbitrium* pleaded, the plaintiff replied, and showed an award that the defendant should pay five pounds

—1 Roll. Abr. 259. 2 Roll. Rep. 2. 1. Mod. 590. 2. Mod. 170. 3. Lev. 188. 344. 1. Show. 2-2. Cro. Eliz. 13. Cro. Jac. 353. 9 Mod. 63. 10. Mod. 200. 12 Mod. 116. Prec. Ch. 223 Fitzg. 54. 168. 272. Comyns, 328. 547. Stra. 903. 923. 1024. 1082. 1. Ld. Ray. 116 246 112 2. Ld. Ray. 898. 964 1076. 1142. 2. Ld. Ray. 115 1. Com. Dig. 355. 2. Bl. Rep 1117. 6. Mod. 33. 10. Mod. 201. 1. Ld. Ray. 116. 2 Ld. Ray. 964. 1. Burr. 177. Kyd on Awards, 164.

to

to the plaintiff presently, and give bond for the payment of ten pounds more on the 29th day of *November* following, and that this should be for and towards the charges and expences in and about certain differences then depending between the parties, and that they should *now* sign *general releases*. To this replication the defendant demurred.

REES against PHELPS.

It was argued to be a void award, because *mutual releases* were then to be given which would discharge the bond payable in *November* following.

But THE COURT held it to be good; for the releases shall discharge such matters only as were depending at the time of the submission.

Godfrey and Others *against* Eversden.

Case 169.

The paying towards the repairs of a *chapel of ease* will not prevent the churchwardens from proceeding in the spiritual court for non-payment of a rate for repairing the *mother-church*.

THERE was a *parish-church* and a *chapel of ease* in the parish of *Hitchen*. The defendant was taxed towards the repairs of *the church*, and a libel was brought against him for the refusing of the payment of that tax.

He now suggests, that there was a *chapel of ease* in the same parish, to which the inhabitants do go, and that they have always repaired that chapel; and so prayed a prohibition.

TREMAINE, *Serjeant*, moved for a consultation, because the parishioners of common right ought to repair *the church*; and though there is a *chapel of ease* in the same parish, yet that ought not to excuse them from repairing of the mother-church. He produced an affidavit that there had been no divine service there for forty years past, nor burials, or baptism.—Whereupon a prohibition was denied.

S. C. Comb. 148. Hob. 66. 2. Roll. Abr. 289.

10. Mod. 13. 12. Mod. 327. 416. 1. Ld. Ray. 59. 112. 3. Com. Dig. " Esglise" (G 2.).

* Anonymous.

Case 170.

Attainder for treason, if no *arraignment* be entered, is erroneous.

A GENTLEMAN was convicted upon his own confession for high treason in the rebellion of the *Duke of Monmouth*, and executed.

IT WAS MOVED that his attainder might be reversed; the Judges were attended with Books, and the exceptions taken were, *viz.*

Co. Ent. 358. 1. Show. 131. 8. Mod. 26. 2. Hale, 217.

FIRST, There was no arraignment, or demanding of judgment.

12. Mod. 51. 95. 312. Ld. Ray. 1. 3. Com. Dig. 513. Ray. 408. 1. Hawk. P. C. 438.

Capias is the first process on an indictment of treason.—12. Co. 103. Ray. 375. Show. 75. Stra. 309. 2. Hale, 194. 2. Hawk. P. C. 403. 427.

SECONDLY, There was process of *venire facias*, which ought not to be in treason, but a *capias*.

If judgment be given on an indictment, without a demand of what the party has to say, &c. it is erroneous.

THIRDLY, Because after the confession the judgment followed, and it does not appear that the party was asked what he could say why sentence of death shall not pass upon him; for possibly he might have pleaded a pardon.

For these reasons the attainder was reversed.

1. Show. 132. 1. Sid. 85.

Case 171.

Mr. Parkinson's Case.

A *mandamus* does not lie to restore a person to a fellowship in a college when there is a *visitor*.

S. C. Comb. 143. S. C. Carth. 92. S. C. 1. Show. 74. S. C. Holt, 143. Post. 332. 1. Mod. 82. 1. Sid. 29. 71. Ray. 31. 1. Lev. 23. 5. Mod. 404. 422. 4. Mod. 122. 8. Mod. 148. 367. 10. Mod. 56. 68. 11. Mod. 221. 12. Mod. 232. Gilb. E. R. 179. Fitzg. 107. 2. Peer. Wms. 326. 1. Stra. 159. 557. 2. Stra. 797. 912. 1192. Fort. 202. Stra. 557. 797. Ld. Ray. 1334. 3. Burr. 1647. 4. Com. Dig. "Mandamus" (A.). 5. Com. Dig. "Visitor" (B). 1. Bl. Rep. 24. 2. Term Rep. 338. *notis*, 290. 4. Term Rep. 223. 241. *notis*.

A MANDAMUS was moved for to restore him to a fellowship of *Lincoln College* in *Oxford*, being a member of a lay corporation, and having a freehold in it.

The like mandamus had been granted to restore *Dr. Goddard* to the place of one of the fellows of the *college of physicians* in *London*, which is a lay corporation.

But it was denied by THE COURT, for *the visitor* is the proper judge; and when a man takes a fellowship, he submits to the rules of the college and to the private laws of *the founder*. It was denied by my LORD HALE in *Dr. Roberts's Case*, because in all *lay corporations* the founder and his heirs are visitors, and in all *ecclesiastical corporations* the bishop of the diocese is the proper visitor, who is *fidei commissarius*, and from whose sentence there is no appeal to this court, especially in the case of a fellowship of a college, which is a thing of private design, and not at all concerning the public.

*[266]

Case 172.

* Orbil *against* Ward.

Hilary Term, 3. & 4. Jac. 2. Roll 1018.

Appeal of murder.

A. B. *nuper de parochia Sancti Jacobi Westm. in comitatu Midd. generosus, attachiatus fuit per corpus suum ad respondend.* C. D. *viduæ, quæ fuit uxor* J. D. *generosi, de morte præd.* J. *quondam viri sui unde eum appellat. Et sunt pleg. de pros.* J. B. *nuper de parochia Sancti Jacobi Westm. in comitatu Midd. gen. et* JOHANNES DOE *de eadem gen. Et unde eadem* ELIZABETHA *per* E. F. *attornatum suum juxta formam statut. in hujusmodi casu edit. et provis. instanter appellat præd.* A. B. *de eo quod ubi præd.* J. D. *fuit in pace Dei et dicti Domini Regis nunc apud parochiam Sancti Jacobi infra libertatem Westm. in comitatu Middlesex. decimo die* J. *anno Regni Domini Jacobi nuper Regis Angliæ tertia hora prima post meridiem ejusdem die ibidem scilicet apud parochiam Sancti Jacobi infra libertatem Westm. in com. Midd. venit præd.* A. B. *et felonicè ac ut felo dicti Domini Regis nunc voluntariè et ex malitia*

malitia sua præcogitat. et insidiis præmeditatis, contra pacem dicti Domini Regis, nunc hora nona post meridiem ejusdem diei in et super præfat. J. D. *adtunc vi et armis, &c. apud parochiam Sancti Jacobi infra libertatem Westm. prædict. in comitatu prædicto, insultum fecit et prædict.* A. B. *adtunc et ibidem cum quodam gladio, Anglicè* A RAPIER, *ad valentiam quinque solidorum quod ipse idem* A. B. *in manu sua dextra adtunc et ibidem scilicet prædicto decimo die* J. *anno tertio supradicto apud parochiam Sancti Jacobi infra libertatem Westm. prædict. in com. Midd. præd. habuit et tenuit, ipse prædict.* J. D. *in et super sinistram partem ventris ipsius* J. D. *prope umbilicum, Anglicè* THE NAVEL, *ipsius* J. D. *adtunc et ibidem felonicè voluntariè et ex malitia sua præcogitata percussit et pupugit, et dedit eidem* J. D. *adtunc et ibidem in et super prædictam sinistram partem ventris ipsius* J. D. *prope dictum umbilicum ipsius* J. D. *cum gladio prædicto unam plagam mortalem longitud. dimid. unius pollicis et profunditat. sex pollicium, de qua quidem plaga mortali idem* J. D. *à prædicto decimo die* J. *anno tertio supradicto apud prædictam parochiam Sancti Jacobi infra libertatem Westm. in comitatu Midd. prædict. languebat et languidus vixit; et adtunc scilicet decimo sexto die Junii anno tertio supradicto apud parochiam Sancti Jacobi infra libertatem Westm. in comitatu Midd. prædict. ipse idem* J. D. *de plaga mortali * prædicta obiit; et sic præfat.* A. B. [267] *prædictum* J. D. *apud parochiam Sancti Jacobi infra libertatem Westm. prædict. in comitatu Midd. prædict. modo et forma prædict. voluntariè et ex malitia sua præcogitata interfecit et murdravit contra pacem dicti Domini Regis nunc coron. et dignitates suas. Et quam cito idem* A. B. *feloniam et murdrum prædict. fecisset, ipse idem* A. B. *fugit dictaque* C. D. *ipsum recenter insecut. fuit de villa in villam usque ad quatuor villas propinquior; et ulterius quousque, &c. Et si prædictus* A. B. *feloniam et murdrum prædict. ei in forma præd. imposit. velit dedicere præfat.* C. D. *hoc parata est versus eum probare prout Curia, &c.*

ORBIL against WARD.

Plea in abatement that there is no such place as the parish named.

The defendant having prayed judgment of the original writ PLEADED, *quòd ipse* A. B. *per breve illud appellat. existit per nomen* A. B. *nuper de parochia Sancti Jacobi Westm. in comitatu Midd. generosi, ubi revera et in facto infra comitatum Midd. prædict. est quædam parochia vocat. et cognit. per nomen parochiæ Sancti Jacobi infra libertatem Westm. sed in eodem comitatu Midd. non habetur, nec die impetrationis brevis originalis appelli prædict. seu unquam habebatur aliqua parochia sive locus cognit. et nuncupat. per nomen parochiæ Sancti Jacobi Westm. tantum prout præd.* C. D. *per breve suum superius supponit. Et hoc ipse idem* A. B. *parat. est verificare; unde petit judicium de brevi illo, et quòd præd. breve cassetur.*

The plaintiff demurred; and the appellee joined in demurrer.

Case 173. **Orbil against Ward.**

Hilary Term, 3. & 4. Jac. 2. Roll 1018.

To an appeal of murder the appellant may pray judgment, if the appellee plead in abatement, without pleading over to the felony.

AN APPEAL OF MURDER was brought against *A. B.* of the parish of *St. James's Westminster* in the county of *Middlesex*, gent. for that he on the 10th day of *June* in the third year of *King James* did run the deceased into the left part of his belly with a rapier, and that he died of that wound three days afterwards.

1. Show. 47. Carth. 56.

The defendant demands *oyer* of the return, and pleads that there is a parish known by the name of "the parish of *St. James* "within the liberty of *Westminster*," but no such place as "the "parish of *St. James Westminster*" only (*a*).

And upon a demurrer it was argued that this plea was not good, for it being in *abatement* the appellee ought to have pleaded over to the murder; so it was adjudged in the case of *Watts v.* [268] *Brain* (*b*), the pleadings of which case are at large in my *Lord Coke*'s entries.

An appellee must appear in proper person.

* SECONDLY, He ought to have pleaded in person, and not by attorney; the *statute of Gloucester* is plain in this point.

2. Inst. 313. Carth. 55. Salk. 59. 64. Skin. 48. Carth. 394. 2. Hawk. P. C. 257. Fitzg. 95. 11. Mod. 216. 12. Mod. 20. 65

CURIA. If the plea is in abatement, and the party do not answer over to the murder, yet that does not *oust* him of his plea, but the appellant ought to have prayed judgment.

It is a question, Whether he ought to plead over to the felony or not? for the precedents are both ways.

There is no judgment entered.

1. Ld. Ray. 557. 2. Ld. Ray. 1289.

(*a*) See 5. *Ann.* c. 16. which requires all pleas in abatement to be verified on oath. 3. Burr. 1617. Stra. 1161.

(*b*) Cro. Eliz. 694. See also Crisp v. Verrall, Cro. Eliz. 910. and 2. Hawk. P. C. 277.

Case 174. **Proud against Piper.**

On a libel for a mortuary, if the defendant suggest *no custom*, the Court will grant a prohibition.

THERE WAS A LIBEL brought in the spiritual court for a mortuary.

S. C. Comb. 166. S. C. Carth. 97. 12. Co 76. 1. Term Rep. 552.

The defendant suggests, that by the statute of 21. *Hen.* 8. c. 6. (*a*) no mortuary ought to be paid but in such places where it had been usually paid before the making of that statute, and that there was no custom in this place to pay a mortuary. And it was thereupon moved for a prohibition; for mortuaries are not due by law, but by particular custom of places (*b*).

12. Mod. 260. 397. 416. 4. Com. Dig. 506. Stra. 715. Dougl. 378. H. Bl. Rep. 100.

(*a*) See 28. *Geo.* 2. c 6. and 2. Bl. Com. 426.

(*b*) White's Case, Cro. Eliz. 151.; Hinde v. Chester, Cro. Car. 237. See also Selden on Tithes, 287. 2. Inst. 491.

It is true, a prohibition was denied in the case of *Mark v. Gilbert (a)*, but it was because it was admitted that there a mortuary was due by custom, but they differed in the person to whom it ought to be paid. PROUF against PIRR.

CURIA. Prohibitions have been granted and denied upon such suggestions. Therefore the defendant was ordered to take a declaration in a prohibition as to the mortuary, and to try the custom at law.

(a) 1. Sid. 263.

Lutwich *against* Piggot. Case 175.

A power to make leases for three lives, or twenty one years, or for any term of years, upon one, two, or three lives, will warrant a lease for ninety-nine years, if three lives should so long live.

EJECTMENT for lands in *Northumberland*, tried at the bar. The case was thus:

Peter Venables was seised in fee of the manor of *Long Witton* in the said county, and being so seised made a settlement thereof, by lease and release, to the use of himself for life, without impeachment of waste; then to the trustees for seven years, to raise portions for daughters; then to *William Venables* and the heirs male of his body; and if he die without issue, then to *Ann* his daughter for life, with remainders over. In which settlement there was this proviso: * "PROVIDED, that it shall be lawful for *William* "*Venables*, by will or deed, to dispose of any part of the said manor "to his wife for life." And another proviso to this purpose: "PROVIDED, that it shall and may be lawful to and for the said "*William Venables*, by any deed in writing under his hand and "seal, to demise for three lives, or twenty-one years or under, or "for any time or term of years, upon one, two, or three lives, "or as tenant in tail in possession may do, all or any part of the "said manor, lands, &c. which were in lease for the space of forty "years last past." The defendant's title was a lease for ninety-nine years, made by the said *William Venables* to one *Mary Venables*, if three lives should so long live.

* [269]

The question was, Whether that lease was pursuant to the power in the last proviso?

It was objected that it was not; for it ought to be a lease for twenty-one, and not ninety-nine years, determinable for three lives.

But the plaintiff was non-suit.

2. Roll. Abr. 260. 8. Co. 70. Vaugh. 32. Salk. 537. 1. Vern. 85. 407. 2. Vern. 69. 80. 164. 376. 528. 535. 651. 665. Prec Chan. 256. 293. 452. 474. 8. Mod. 249. 381. 9. Mod. 12. 10. Mod. 31. 72. 446. 466. 471. 12. Mod. 147. 151. Cases T T. 72. 93. Gilb E. R. 1. 137. 166. Fitzg. 156 214. Comyns, 37. 494. 1 Peer. Wms. 149. 245. 604. 741. 777. 2. Peer. Wms. 222. 415. 489. 506. (623). (648). 1. Ld Ray. 268. 2. Ld. Ray. 908. 1198. 1. Stra. 596. 601. 2. Stra. 962. 992. 1. Vern. 85. 407. 2. Vern. 69. Prec. Chan. 256. Cas. T. T. 72. 93. 3. Bac. Abr. "Leases," 415. Cowp. 266. 714. 1. Term Rep. 705.

Case 176. The King *against* Fairfax and Another.

The churchwardens and overseers may place out poor children *apprentices*, and the master they select for such purpose is bound to receive such apprentice.

S. C. 1. Show. 76.
S. C. Comb. 164.
S. C. Carth. 94.
S. C. Holt, 570.
S C. Foley, 223.
1. Lev. 84.
1. Salk. 67. 491.
12. Mod. 27.
1. Stra. 143.
2. Stra. 1268.
2. Ld. Ray. 1117.

AN ORDER made at the quarter sessions of *Gloucester* was removed hither, confirming another order made by the justices there, for the placing of a poor boy to be an apprentice in husbandry: and it was moved that it might be quashed.

MR. POLLEXFEN argued, that the justices had no power given them by the law to compel a man to take such an apprentice: And this will depend upon the construction of such statutes which relate to this matter. The first is that of 5. *Eliz.* c. 4. s. 25. which enacts, "that for the better advancing of husbandry and tillage, "and to the intent such who are fit to be made apprentices to "husbandry may be bound thereunto, that every person being a "housholder, and having or using half a plough land at the least "in tillage, may take any to be an apprentice above ten and under eighteen years, to serve in husbandry, until the party be of "the age of twenty-one or twenty-four years(*a*), the said retainer "and taking of an apprentice to be by indenture." Now before the making of this statute, the practice of putting out poor children was only in cities and great towns, to particular trades and employments. * The next statute is 43. *Eliz.* c. 2. by which power is given "to the churchwardens or overseers of the poor, to "raise weekly or otherwise, by taxation of every inhabitant, such "competent sum or sums of money as they shall think fit, for relief "of the poor, and putting out of children to apprentice." And then in the fifth paragraph power is given to them, by the assent of two justices of peace, to bind poor children "where they shall see "convenient," &c. which words were the foundation for the making of this order. But the construction thereof can be no otherwise than *viz.* whereas before the making of this act poor children were bound apprentices to tillage, now the churchwardens may raise money to bind them out to trades; for if they could compel men to take them, what need was there of raising money to place them out?

* [270]

This must be the natural construction of that law, which appears yet more plain by the words of a subsequent statute, 1. *Jac.* c. 25. s. 23. which continues that of the 43d of *Eliz.* with this addition, "that all persons to whom the overseers of the poor "shall, according to that act, bind any children to apprentice, "may take, receive, and keep them as apprentices." It is true, the general practice of putting out poor children seems to warrant this order; but this has been occasioned by a mistake in *Mr. Dalton's* book (*b*), who reported the resolution of the Judges in 1633 to be, that every man who by his calling, profession, or manner of living, and who entertaineth and must use servants of the like quality, such must also take apprentices. By this resolution the justices of peace have been governed ever since; but TWISDEN, *Justice*, would often say, that those were not the resolutions

(*b*) Dalton's Justice, 114.

(*a*) By 18. Geo. 3. c 47. no male apprentice shall be bound out by any parish for any longer term than till he shall come to the age of twenty-one years.

ſolutions of the Judges as reported by *Mr. Dalton*, and therefore the book was miſtaken.

Secondly, The order itſelf does not mention that the party to whom this poor boy was bound apprentice did occupy any land in tillage, for ſo it ought to be, otherwiſe the overſeers of the poor may bind him to a merchant or to an attorney, which he called a free quarter; for by ſuch means diſeaſes may be brought into a family, and a man has no ſecurity either for his goods or money. This was the opinion of Twisden, *Juſtice*, in *Coutrell's Caſe(a)*; and it ſeems to be very natural, and therefore the chief reaſon why power was given by the ſtatute to the overſeers to raiſe money was, that they might place poor children to ſuch who were willing * to take them for money, for otherwiſe they might compel a man to receive his enemy into his ſervice. He relied on the caſe of the *King v. Price*, *Hilary Term* 29th and 30th of *Car.* 2. which was an order of the like nature moved to be quaſhed: and Twisden, *Juſtice*, ſaid, in that caſe, that all the Judges of *England* were of opinion that the juſtices had not ſuch a power, and therefore that order was quaſhed. [271]

E contra. It is plain that by the ſtatute of the 43 *Eliz.* c. 2. the juſtices may place out poor children "where they ſee it con- "venient," and ſo the conſtant practice has been; ſo is the reſolution of the Judges in *Dalton*, which was brought in by the Lord Chief Justice Hyde, but denied ſo to be by Justice Twisden, for no other reaſon but becauſe Justice Jones did not concur with them. In *Price's Caſe* this matter was ſtirred again, but there has been nothing done purſuant to that opinion. Since then the juſtices have a power to place out poor children. It is no objection to ſay, that there may be an inconvenience in the exerciſe of that power, by placing out children to improper perſons; for if ſuch things be done, the party has a proper remedy by way of appeal to the ſeſſions.

Three Judges were of opinion, that the juſtices of peace had ſuch a power, and therefore they were for confirming the order. Raym. 66.

Dolben, *Juſtice*, ſaid it was ſo reſolved in the caſe of the *King v. Gilliflower*, in the reign of *King James the Firſt*, Foster being then Chief Juſtice, though the Judges in *Price's Caſe* were of another opinion.

The Chief Justice was now likewiſe of a different opinion, for the ſtatute means ſomething when it ſays, "that a ſtock ſhall be "raiſed by the taxation of every inhabitant, &c. for putting out of "children apprentice." There are no compulſory words in the ſtatute for that purpoſe, nor any which oblige a maſter to take an apprentice; and if not, the juſtices have not power to compel a 1. Vent. 325.

(a) 1. Sid. 29.

THE KING *against* FAIRFAX.

man to take a poor boy, for poſſibly he may be a thief or ſpy in the family (*a*).

An order under 43. *Eliz.* c. 2. to bind out an apprentice, muſt ſtate it to be by the churchwardens.

But this order was quaſhed for an apparent fault, which was, that the ſtatute has entruſted the churchwardens and overſeers of the poor by and with the approbation of two juſtices to bind apprentices, &c. and the churchwardens are not mentioned in this order.

(*a*) By 8. & 9. *Will.* 3. c. 30. " When any poor children ſhall be appointed to be bound apprentice, purſuant to the 43. *Eliz.* c. 2. ſ. 5. the perſon or perſons to whom they are ſo appointed to be bound, ſhall *receive* and provide for them according to the indenture, ſigned and confirmed by the two juſtices of the peace, and alſo execute the other part of the ſaid indentures; and if he or ſhe ſhall refuſe ſo to do, oath being made thereof by one of the churchwardens or overſeers of the poor, before any two of the juſtices of the peace for that county, &c. he or ſhe ſhall forfeit, for every ſuch offence, the ſum of TEN POUNDS, &c.; ſaving always to the perſon to whom " any poor child ſhall be appointed to " be bound an apprentice as aforeſaid " his or her *appeal* to the next general " or quarter ſeſſions."—But by the ſtatute 32. *Geo.* 3. c. 57. " On the death " of the maſter of any pariſh apprentice, " upon the binding out of whom no " larger ſum than five pounds ſhall have " been paid, the covenants to *maintain* " and *provide* for ſuch apprentice, ſhall " not continue in force for any longer " term than three calendar months next " after the death of the maſter; and " within the term of thoſe three months, " two juſtices may order the apprentice " to ſerve the reſidue of his term with " another maſter, or they may determine " the apprenticeſhip."

HILARY

HILARY TERM,

The First of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*
Sir William Dolben, *Knt.*
Sir William Gregory, *Knt.* } *Justices.*
Sir Giles Eyre, *Knt.*
Sir George Treby, *Knt. Attorney General.*
John Somers, *Esq. Solicitor General.*

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* [272]
Case 177.

* Thirsby *against* Helbot.

Michaelmas Term, 2. Will. and Mary Roll 435.

DEBT UPON A BOND for performance of an award. Upon *nullum arbitrium* pleaded, the plaintiff replied, and shewed an award made, which amongst other things was, "that the defendant should be bound with sureties such as "the plaintiff should approve in the sum of one hundred and fifty "pounds, to be paid to him at such a time, and that they should "seal mutual releases;" and assigned a breach in not giving of this bond. There was a verdict for the plaintiff.

An award "that "one of the "parties shall "be bound with "such sureties "as the other "shall approve, "and that they "shall then sign "mutual re- "leases," is not *final*, and therefore *void*; for if the party disapprove of the *surety*, he need not sign *the release*.

PEMBERTON, *Serjeant*, now moved in arrest of judgment, that this was a void award, because it is that the defendant shall be bound with sureties, &c. and then releases to be given; now the sureties are strangers to the submission, and therefore the defendant is not bound to procure them. He relied upon the case of *Barns v. Fairchild*, which was an award "that all controversies, &c. should cease, and that one of the parties should pay "to the other eight pounds; and that thereupon he should procure his wife and son to make such an assurance, &c." this was held to be void, because it was to bind such persons who were not parties to the submission.

S. C. 1. Show. 82.
S. C. Carth. 159.
1. Roll. Abr. 244. 259.

Cro. Jac. 315. 1. Salk. 71. B. R. H. 181. 8. Mod. 212. 10. Mod. 205. 12. Mod. 129. 1. Vern. 259. Stra. 903. 1025. 1. Com. Dig. 388. Comy. 183. 1. Bac. Abr. 144. Kyd on Awards, 124. 1. Ld. Ray. 123. 246. 2. Peer. Wms. 450.

TREMAINE,

THIRSBY *against* HELBOT.

TREMAINE, *Serjeant*, *contra*. That cause does not come up to this at the bar, because by this award the party was to sign a *general release*, whether the defendant paid the money or not.

*[273] * But THE COURT was of opinion, that the award was void, because it appointed the party to enter into a bond "with *such* "*sureties as the plaintiff shall like*, and releases then to be mu-"tually given." Now if the plaintiff does not like the security given, then he is not to seal a release, and so it is but an award of one side.

Case 178. **Savier *against* Lenthal.**

In an assize for an office, the demandant must set forth his title; and the Court will adjourn the assize, to afford him an opportunity of doing so.

S. C. Salk. 82. S. C. Comb. 173. 207. S. C. Lilly's Ent. 93. Plo. Com. 403. 4. Edw. 4. pl. 6. Dyer, 114. 152. 2. Sid. 73. 1. Com. Dig. "Assize" (B.8.). (B.11.). 3. Bac. Abr. 732. 4. Term Rep. 355.

ASSISA ven. recogn. si WILLIELMUS LENTHAL, *armiger*; HENRICUS GLOVER, *armiger*; JOHANNES PHILPOT, *generosus*; THOMAS COOK, *generosus*; *et* SAMUEL ELLIS, *generosus*, *injustè*, &c. *disseisiverunt* THOMAM SAVIER *de libero tenemento suo in Westm. infra triginta annos*, &c. *Et unde idem* THOMAS SAVIER *per* JACOBUM HOLTON *attornatum suum queritur quòd disseisiverunt eum de officio Marr. Maresc. Domini Regis et Dominæ Reginæ coram ipso Rege et Regina cum pertin.* &c.

The cryer made proclamation, and then called the recognitors between *Thomas Savier* demandant, and *William Lenthal* tenant, who were all at the bar, and severally answered as they were called.

Then MR. GOODWIN, of *Gray's Inn*, arraigned the assize in French; but the count being not in parchment upon record, the recognitors were for this time discharged, and ordered to appear again the next day.

But the Counsel for the tenant relied on the authority in *Calvert's Case*, that the title ought to be set forth in the count, which was not done now, and therefore the demandant ought to be nonsuited.

But the writ being returnable that day, was *ex gratiâ Curiæ* adjourned to the morrow afterward; and if the demandant did not then make a title, he must be nonsuited.

The next day the jury appeared: then the cryer called *Thomas Savier* the demandant, and then the tenants, and afterwards the recognitors; and the assize being arraigned again, the demandant set forth his title.

SIR FRANCIS WINNINGTON, of counsel for *Mr. Lenthal*, one of the tenants, then appeared after this manner, "*Veux avez icy* "*le dit* WILLIAM LENTHAL, *et jeo prye oyer del brief et del* "*count.*"

Then the other tenants were called again three times, and they not appearing, process was prayed against them *(a)*.

(*a*) By S. C. Comb. 173. the demandant was nonsuited the second day for not counting; and S. C. 1. Salk. 82, the Court told him he might bring a new assize. See Dyer, 58. 114. 149. Jenk. 42. 8. Co. 45. 10. Mod. 125. 1. Bac. Abr. 163.

Doe

* Doe *against* Dawson. Case 179.

BAIL was put in to an action brought by the plaintiff; and before he declared, the defendant obtained an injunction to stay proceedings at law, which was not dissolved for several Terms afterwards. Then the injunction was dissolved, and the plaintiff delivered his declaration, and had judgment by default.

If a suit be stayed by injunction, before declaration delivered, the bail are liable, if the plaintiff deliver his declaration within two Terms after the injunction is dissolved.

And now he brought a *scire facias* against the bail, who pleaded, that no declaration was delivered or filed against the principal within two Terms after the action commenced and the bail entered.

And upon a demurrer the plaintiff had judgment against them, for the bail are liable, so as the principal in the action declare soon after the injunction dissolved; and it is no fault in the plaintiff that he did not declare sooner, for if he had, he would have been in contempt of the court of chancery for a breach of the injunction.

1. Roll. Abr. 333. Moor, 850. 1. Com. Dig. "Bail" (M.).

8. Mod. 315. 3. Peer. Wms. 36. 1. Bac. Abr. 217.

Anonymous. Case 180.

A WRIT OF ERROR was brought to reverse a recovery suffered in the grand sessions of *Wales*.

In error to reverse a recovery, there must be a *scire facias* against the heir and tertenants, although the heir is within age.

The question now was, Whether there ought to be a *scire facias* against the *tertenants* and the *heir*?

It was said that it is discretionary in the Court, and that the first case of this nature was in my *Lord Dyer* (*a*), where a writ of error was brought in the king's bench to reverse a fine levied in the county palatine of *Chester*, and a *scire facias* was brought against the heir, but not against the tertenants. But the heir in this case is an infant; so that if he be admitted to be a defendant, he ought not to appear during his minority, and there is no remedy till his full age.

Curia. It is not necessary in point of law, but it seems to be the course of the Court, and that must be followed; and it is reasonable it should be so, because the errors upon a recovery should not be examined before all the parties are in court; therefore there should be a *scire facias* against the *heir* and the *tertenants* (*b*).

Ante, 119. 1. Sid. 213. Dyer, 321. Ray. 17. Carth. 112. Skin. 273. Savil, 10. Holt, 614. Cruise on Recov. 290. 5. Mod. 209. 6. Mod. 134. 8. Mod. 195. 290. 9. Mod. 143. 1. Vern. 367.

2. Vern. 132. 226. 711. Gilb. E. R. 16. Stra. 1129. 1179. 1185. 1257. 1267.

(*a*) Dyer, 321.

(*b*) See the case of Kingston *v.* Herbert, ante, 119.; Hall *v.* Woodcock, 1. Burr. 361, 362.; Sheepshanks *v.* Lucas, 1. Burr. 410. Cruise on Recov. 125. 289.; Lord Pembroke's Case, Rep. Temp. Holt, 614.

Case 181. * Lambert *against* Thurston.

Trespass *vi et armis* lies in B. R. though damages are under forty shillings.

S. C. Carth. 108.
S. C. 3. Salk. 359.
2. Inst. 310. 312.
F. N. B. 47.
Raym. 293.
1. Bac. Abr. 593. 8. Mod. 371. 10. Mod. 133. 217. 275. 11. Mod. 198. Gilb. E. R. 195. 1. Stra. 192. 2. Stra. 1130. 1168. 1. Ld. Ray. 395. 566.

TRESPASS *quare vi et armis clausum fregit, &c.* which the plaintiff had laid to his damage of *twenty shillings*.

The defendant demurred to the declaration, and for cause shewed that the court of king's bench hath not cognizance either by the common law, or by the *statute of Gloucester* 6. *Edw.* 1. c. 8. to hold plea in such an action, where the damages are laid to be under *forty shillings*.

But THE COURT were of another opinion, *viz.* that an action of trespass *quare vi et armis* will lie here let the damage be what it will.

So the plaintiff had judgment (*a*).

(*a*) But see the case of Stean *v.* Holmes, that in an action of *assumpsit*, if it appear by the plaintiff's bill delivered, and by his own acknowledgment proved by affidavit on the one side, and not denied by the other, that the demand is under *forty* shillings, the Court will stay the proceedings, 2. Bl. Rep. 754. So also in the case of Kennard *v.* Jones, where it appeared on an affidavit by the defendant, that on applying to the plaintiff's attorney to shew what the debt was, he said it was a guinea and a half, the Court stayed the proceedings; for by the statute 6. *Edw.* 1. c. 8. parties are expressly prohibited from suing in the superior courts for *debts* under forty shillings, 4. Term Rep. 496. So also in Wellington *v.* Arters, on an affidavit made by the defendant that the debt did not amount to forty shillings, 5. Term Rep. 64.; but in the case of Daniel *v.* Phillips, the Court refused to quash a writ of *certiorari* to remove an action of *assault* against an excise officer from an inferior court, although the damages laid were under forty shillings, 4. Term Rep. 499.

EASTER TERM,

The Second of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*
Sir William Dolben, *Knt.*
Sir William Gregory, *Knt.* } *Justices.*
Sir Giles Eyre, *Knt.*
Sir George Treby, *Knt. Attorney General.*
Sir John Somers, *Knt. Solicitor General.*

* Whitehal *against* Squire. Case 182.

TROVER FOR A HORSE. The defendant pleaded *not guilty*, and a special verdict was found.

If a person consent to the disposition of an intestate's goods, and afterwards take out administration, he cannot maintain trover for them; for he is bound by his former consent.

John Mathers was possessed of this horse, and on the 4th day of *December*, in the first year of *King James the Second*, put him to grass to the defendant, who kept him till the first day of *May* following. *John Mathers* died intestate, and before administration was granted, the plaintiff desired the defendant to bury the said *Mathers*, and that he would see him satisfied for his expences; and accordingly the defendant did bury him. The plaintiff then gave this horse to the defendant in part of satisfaction for the charges of the funeral, and a note under his hand to pay him twenty-three pounds more. The plaintiff afterwards took out administration, and brought his action against the defendant for this horse.

S. C. 1. Salk. 295.
S. C. 3. Salk. 161.
S.C. Skin. 274.
S. C. Holt, 45.
Cro. Eliz. 377.
2. Ro. Ab. 554.
Skin. 143.
Stra. 97.
2. Ter. Rep. 97.

The question was, Whether this was a conversion or not?

DOLBEN and EYRE, *Justices*, held that it was not, but THE CHIEF JUSTICE was of another opinion (*a*).

(*a*) It is said, S. C. 1. Salk. 296. that the defendant had judgment, because, S. C. Holt, 45. the plaintiff had consented and agreed that he should have the horse, S. C. 3. Salk. 161.: but HOLT, *Chief Justice*, *contra*, for the ordering of the funeral made the defendant an EXECUTOR *de son tort*; and the plaintiff desiring him to bury the intestate, and his consent that he should keep the horse being before he had any *legal authority* upon the subject, would not alter the case. S. C. 1. Salk. 296. S. C. Skin. 274.

Cole

Case 183. * Cole *against* Knight.

Hilary Term, 1. & 2. Will. & Mary, Roll 810.

If *A.* an executor, upon payment to him of a legacy by *B.* the executor of *C.* releases "the "legacy, and "all actions, "suits, and demands, whatsoever, which "he had or may "have against "the said *B.* as "executor of "*C.* or may or "can have for "any matter or "thing whatsoever," this does not release a debt due from *C.* to *A.*

S. C. 3. Lev. 273.
S. C. Carth. 118.
S. C. 1. Show. 150.
S. C. Holt, 620.
Salk. 575.
1. Lev. 99.
1. Sid. 141.
2. Lev. 272.
1. Vent. 35.
Ld. Ray. 235.
4. Bac. Abr. 290, 291.

SCIRE FACIAS upon a judgment of six thousand pounds brought by the plaintiffs *Knight* and *Donning*, as surviving executors of *John Knight*, against the defendant *Cole* and his wife, as executrix of *John Lawford*; setting forth, that *Sir John Knight*, *Mr. Eyre*, and *John Knight*, had recovered a judgment of six thousand pounds against *John Lawford*; that *John Knight* survived, who made his will, and appointed *John Kent*, *Thomas Knight*, and *William Donning*, to be his executors; that he died, the debt and damages not being satisfied; that they the said *Knight* and *Donning* proved the will; that *John Kent* died; and that *John Lawford* made his will, and appointed his daughter *Mary*, now the wife of *Thomas Cole*, to be sole executrix, and soon after departed this life; that *Cole* proved *Lawford*'s will, and that the debt was not yet paid.

The defendant *Cole* and his wife pleaded A RELEASE from *Donning*, one of the plaintiffs, by which he acknowledged to have received of the said *Cole* and his wife, as executrix of the last will and testament of *John Lawford*, the sum of five pounds, being a legacy given to him by *Lawford*; and then in general words he released the said *Cole* and his wife of *the legacy*, and of "all actions, suits, and demands whatsoever which he had or "might have against the defendants *Cole* and his wife, as executrix of *John Lawford*, or may or can have for any matter or "thing whatsoever."

To this plea the plaintiff demurred.

The question was, Whether the release is a good bar or not?

It was argued to be no bar; for it being given upon the receipt of the legacy, is tied up to that only, and shall not be taken to release any other thing. If a man should receive ten pounds and give a receipt for it, and thereby acquits and releases the persons of all actions, debts, duties, and demands, nothing is released but the ten pounds, because the last words must be limited to those foregoing *(a)*. It is no new thing in the law for general words to be restrained by those which follow; as for instance, if a release be of all errors, actions, suits, and writs of error whatsoever, it has been held that an action of debt upon a bond was not released, but only writs of error *(b)*. * [278] And it seems to be the intent of the parties here, that nothing but the legacies should be released; and therefore those general words which follow must be confined to the true meaning and intention of him who gave the

(a) Cited by *Tanfield*, in Morris *v.* Wise, 2. Roll. Abr. 409. 2. Lev. 214. 2. Jones, 104. 2. Show. 46. Freem. 474.—See also Carth. 119. 1. Show. 155. where HOLT, *Chief Justice*, says, this case is not law, 3. Keb. 814. 840.

(b) Hetley, 15. See also Andr. 64. Hob. 74. Dyer, 240. Ld. Ray. 666. 4. Bac. Abr. 289, 290.

the release (a). So it is if a man promise to pay forty shillings to another during life, a release of "all quarrels, controversies, "and demands which he had or may have," will not discharge this annuity, because the execution of the promise was not to be till the rent should be due (b). So likewise a release of "all de-"mands" will not discharge a growing rent (c).—AND SECONDLY, If this should be a good release, it discharges only such actions which he has in his own right; for by the words all actions which he had are released; now if an executor grant *omnia bona sua*, the goods which he has as executor do not pass (d).

Cox against KNIGHT.

11. Mod. 15. Stra. 1144.

E CONTRA it was argued, That this is a good bar; for by the first words the legacy is released; then the subsequent words, "all "actions, suits, and demands whatsoever which he had against "the defendant as executor of *Lawford*," must mean something. It is true, where general words are at the beginning of a release, and particular words follow, if the general words agree with those which are particular, the deed shall be construed according to the special words: but where there are such words at first, and the conclusion is with general words, as it is in this case, both shall stand; for the rule is, *generalis clausula non porrigitur ad ea quæ antea specialiter sunt comprehensa* (e). These words do also release not only such actions which he had in his own right, but also as executor to *Mr. Lawford*. If a man has a lease in right of his wife, as executrix to her former husband, and he grants all his right and title therein; by this grant the right which he had by his wife doth pass, for the word "his" doth imply a propriety in possession.

Ld. Ray. 269. 9. Mod. 42. 12. Mod. 294.

But, PER TOTAM CURIAM, judgment was given for the plaintiff. If an executor has goods of the testator's, and also other goods in his own right, and then grants *omnia bona sua*, in strictness the goods which he has as executor do not pass, because they are not *bona sua*, but so called because of the possession which he has; and therefore it must be a great strein * to make general words which are properly applicable to things which a man hath in his own right, to extend to things which he has as executor. It was never the intent of the party to release more than what he had in his own right, and that appears by the recital of the legacy of five pounds; and therefore the words which follow must have a construction according to the intent of *Donning* at the time of the making the release, and shall be tied up to the foregoing words, and then nothing will be discharged but the legacy. As if a lease for years be made, and the lessor enter into a bond that he will suffer the lessee quietly to enjoy during the term, without trouble of the lessor, or any other person; if an entry should be made upon the lessee without the procurement or knowledge of the lessor, the condition is not broken, for the

* [279]

Ld. Ray. 1154.

(a) 1. Andr. 64. Carth. 119. 1. Show. 151. Lutw. 249. Holt, 620. 3. Lev. 274.; and see the case of Thorpe v. Thorp, 1. Ld. Ray. 235.

(b) Yelv. 156.

(c) 1. Sid. 141.

(d) Cro. Eliz. 6. 1. Leon. 263.

(e) 3. Co. 154.

last

COLE *against* KNIGHT.

last words are tied up to the word "suffer (*a*)." If the legacy had not been released by particular words, it would not have been discharged by a release of "all actions and demands whatsoever;" and therefore there would be a great inconvenience if these general words should be construed to release any thing besides this legacy: for suppose there are two executors, and one refuses to administer, but meeting with a debtor of the testator, gives him a release of all actions, will this amount to an acceptance of the administration? Certainly it will not. The words in this case are not of that extent as to release actions as an executor; for it is a release which goes to the right. It is like the case (*b*) where one of the avowants released the plaintiff after the taking of the cattle; which was adjudged void upon a demurrer, because he had not then any suit or demand against the plaintiff, but had distrained the beasts as bailiff, and in right of another.

DOLBEN, *Justice*, cited a case of *Stokes v. Stokes*, adjudged in the king's bench in the year 1669 (*c*). The plaintiff released all which he had in his own right: there was a bond in which his name was used in trust for another; and afterwards he brought an action of debt upon that bond, to which the release was pleaded. The plaintiff replied, that the release was only of all such actions which he had in his own right, and not such which he had in the right of another. Upon this they were at issue, and the plaintiff

Ld. Ray. 1306. had a verdict; and MR. SYMPSON moved in arrest of judgment,

* [280] * that this bond must be in his own right; but the Court affirmed the judgment (*d*).

(*a*) Dyer, 255.
(*b*) 1. Roll. Rep. 246.
(*c*) 1. Vent. 35. 1. Lev. 272. 2. Keb. 530.
(*d*) See the case of Hutchinson v. Savage, 2. Ld. Ray. 1306.

Case 184.

Anonymous.

It is actionable to say, "He "stole *the Colonel's cloth*;" and the declaration is good, without a *colloquium* of *the Colonel* or *the cloth*. *Sed quære*.

AN ACTION ON THE CASE was brought for these words: "He "stole *the Colonel's* cupboard-cloth."

It was made a question whether these words were actionable, there being no precedent discourse laid in the declaration, either of *the Colonel* or his *cupboard-cloth*.

1. Roll. Abr. 96.
Cro. Jac. 39. 266.
Hob. 331.

But THE COURT held the words actionable, for it is a charge of felony; and if such words, as now laid in this declaration, are not actionable, any person may be scandalized; for it is and must be actionable to say *of* a man, that "he stole *my lord's* horses," or "*the parson's* sheep," though it do not appear to what *lord* or *parson* they did belong.

1. Roll. Rep. 440. Ray. 33. 1. Stra. 142. 1. Vent. 264. 8. Mod. 30. 371. 2. Stra. 1130. Ld. Ray. 959. 1417. Cowp. 276.

The

The King *against* Silcot. Case 185.

THE DEFENDANT was convicted before a justice of the peace, upon the statute of 33. *Hen.* 8. c. 6. for *keeping* of a gun; and upon proof it appeared that he had not 100l. *per annum.*

A conviction on 33. *Hen.* 8. c. 6. for keeping a gun, must state, that the offender had not 100l. a-year *when* the offence was committed.

. The record of the conviction was removed into the king's bench, and this exception was taken to it, VIZ. *non habuisset* 100*l. per annum*, but does not say *when*; for it may be that he had one hundred pounds *per annum* at the time when he kept a gun, but not when he was convicted.

Show. 48. Fitzg. 124. 1. Ld. Ray. 150. 2. Ld. Ray. 902. 1220. 1387. 1415. 1478. 1546. 2. Stra. 1184. 1. Stra. 66. 496. 608. 10. Mod. 27. 248. 341. 378. 1. Burr. 148. Dougl. 331. 1. Term Rep. 125. 320. 2. Term Rep. 18.

It was answered, that the words *non habuisset* shall relate to all times past, and it is as much as to say *nunquam habuit*, and the conclusion being *contra formam statuti*, must explain such words which seem to be doubtful. This was compared to the case (*a*) where debt was brought upon the statute of 1. *Rich.* 3. c. 3. for taking away of goods before the plaintiff was convicted of the felony laid to his charge *contra formam statuti*, he being only committed upon suspicion; now though he did not alledge that the goods were taken for this cause, it shall be intended they were so taken when no other cause is shewed.

CURIA. This is a conviction before a justice of the peace, and therefore the time when the offence was committed should be * certainly alledged, *viz.* that the defendant *prædict. die et anno* had not 100l. *per annum.* For which reason it was quashed (*b*). *[281]

(*a*) Hill *v.* Langley, Cro. Eliz. 749. where a case from Dyer, 312. is cited to the same effect: an action for distraining beasts of the plough *contra formam statuti*, and not alledged that he had other goods sufficient for the distress; yet held good, because *contra formam statuti* implies as much.

(*b*) The words of 33. *Hen.* 8. c. 6. are, "That no person, except he has in "his own right, or in the right of his "wife, to his or their own uses, lands, "&c. to the yearly value of one hundred "pounds, shall shoot in any hand-gun, "&c. or *use to keep* in his house, or "elsewhere, any hand-gun, &c. on "pain of ten pounds."—But this act is repealed by 6. & 7. *Will.* 3. c. 13. It has, however, been determined, on the statutes of 22. & 23. *Car.* 2. c. 25. and 5. *Ann.* c. 14. which prohibits unqualified persons from keeping guns to kill game, that not only the *negative qualifications* must be set out in the *information*, as in Rex *v.* Mancot, 1. Stra. 66.; Rex *v.* Hill, 2. Ld. Ray. 1415.; Rex *v.* Jarvis, 1. Burr. 148.; Bluet *v.* Needs, Comyns, 525.; Rex *v* Wheatman, Dougl. 331.; Rex *v.* Hall, 1. Term Rep. 320.; but that *the time* when the offence was committed must also be stated, as in Rex *v.* Pullen, Salk. 369.; Rex *v.* Chandler, Salk. 378.; Reg. *v.* Simpson, 10. Mod. 248. See also Boscawen on Convictions, 22. 26. 43.

Case 186. **Bisse** *against* **Harcourt.**

Hilary Term, 1. Will. & Mary, Roll 217.

A replication confessing and avoiding the facts in the plea, ought not to conclude with a demand of damages.

S. C. 1. Salk. 177.
S. C. 1. Show. 155.
S. C. Carth. 126. 137.
S. C. 2. Ld.

THE PLAINTIFF brought an action for four hundred pounds for so much money had and received of him by the defendant. The defendant pleaded an attainder of high treason in abatement, and therefore ought not to answer the declaration. The plaintiff replied, that after he was attainted, and before this action brought, he was pardoned, and concludes thus, "*unde petit judicium et damna sua.*"

The defendant demurs; and for cause shewed, that the replication is not well concluded, for "*damna sua*" ought to be left out.

And of that opinion was THE COURT; and therefore a rule was made, that he might discontinue this action without costs.

Ray. 1053. Rast. Ent. 663. 681. Co. Ent. 160. Show. 255. 1. Com. Dig. 68. 4. Bac. Abr. 50. Lucas, 112. 1. Ld. Ray. 338, 339. 694. 2. Ld. Ray. 1021. 1053. 1. Lev. 312. Lutw. 36. 6. Mod. 236. 10. Mod. 205. 12. Mod. 119. 400. Cowp. 575. Dougl. 428. 2. Term Rep. 439.

Case 187. **Mordant** *against* **Thorold.**

Hilary Term, 1. & 2. Will. & Mary, Roll 340.

If dower be affirmed on error, and, after writ of enquiry brought, the demandant marries, and dies before the will is executed, her husband, as administrator, shall not have a *scire facias* for the damages; for it is not a duty until assessed.

THE PLAINTIFF brought a *scire facias* upon a judgment. The case was thus: *Ann Thorold* recovered in dower against *Sir John Thorold*, in which action damages are given by the statute of *Merton*, the 20. *Hen.* 3. c. 1. *Sir John Thorold* brought a writ of error in the king's bench, and the judgment was affirmed. Then the plaintiff in dower brought a writ of enquiry for the damages, and married *Mr. Mordant*, and died before that writ was executed. *Mr. Mordant* takes out letters of administration to his wife, and brought a *scire facias* upon the judgment.

The question was, Whether it would lie?

This depended upon the construction of the statute 17. *Car.* 2. c. 8. which enacts, "that in all personal actions, and real and mixt, "the death of either party between the verdict and the judgment "shall not hereafter be alledged for error, so as such judgment "be entered within two Terms after such verdict."

* [282]

S. C. 3. Lev. 275.
S. C. 1. Show. 97.
S. C. Salk. 252.
S. C. Carth. 133.
S. C. Holt, 305.
1. Leon. 56.
3. Lev. 275.

PEMBERTON, *Serjeant*, insisted that this was a judicial writ, and that the administrator had a right to it, though the wife died before the profits were ascertained by the writ of enquiry; it is no more than a plain *scire facias* upon a judgment, which an * executor may have, and which was never yet denied, though this seems to be a case of the first impression.

1. Sid. 188. 1. Lev. 38. 10. Mod. 161. 12. Mod. 346. 2. Ld. Ray. 1050. 4. Bac. Abr. 151.

THE

THE COUNSEL *on the other ſide* argued, that it is true, an executor may have a *ſcire facias* upon a judgment recovered in the life of the teſtator by reaſon only of ſuch recovery; but this *ſcire facias* is brought for what never was recovered, becauſe the wife died before any thing was veſted in her; for the judgment will ſtand ſo as to affect the lands, but not for the damages.

MORDANT *againſt* THOROLD.

CURIA. When a ſtatute which gives a remedy for mean profits is expounded, it ought to be according to the common law Now where entire damages are to be recovered, and the demandant dies before a writ of enquiry executed (*a*), the executor cannot have any remedy by a *ſcire facias* upon that judgment, becauſe damages are no duty till they are aſſeſſed.

Sed adjournatur (*b*).

(*a*) See the 8. & 9. *Will.* 3. c. 11. ſ. 6.

(*b*) It is ſaid, that judgment was given for the defendant, S. C. 1. Show. 97. S. C. 1. Salk. 252. S. C. Carth. 133. S. C. Holt, 305.

TRINITY TERM,

The Second of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir William Dolben, *Knt.*
Sir William Gregory, *Knt.*
Sir Giles Eyre, *Knt.*
} *Justices.*

Sir George Treby, *Knt. Attorney General.*
Sir John Somers, *Knt. Solicitor General.*

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[283]
Case 188.

Shotter *against* Friend and his Wife.

Hilary Term, 2. Will. & Mary, Roll 39.

THE PLAINTIFF and his wife declared upon *a prohibition*, setting forth, that *John Friend* on the 13th of *October*, 22. *Car.* 2. made his will, by which he bequeathed to *Mary Friend* ten pounds, to be paid to her within two years after his decease; and that he made *Jane*, the wife of the plaintiff *Shotter*, executrix, and died; that the said executrix, whilst sole and unmarried, paid the said legacy to *Mary Friend*, who is since dead; that *Thomas Friend*, the husband of the said *Mary*, did after her death demand this legacy in the consistory court of the *Bishop of Winton*; that the plaintiff pleaded payment, and offered to prove it by one single witness, which proof that court refused, though the witness was a person without exception; and thereupon sentence was given there against the plaintiff; which sentence was now pleaded; and upon demurrer to the plea,

A prohibition lies to the spiritual court *after sentence*, and although the libel be for a matter within their jurisdiction, if a temporal matter become incidental, and they refuse such proof as the temporal courts allow, as if they refuse proof of payment of a legacy by a single witness.—S. C. 1. Show. 158. 172. S. C. Comb. 160. S. C. 2. Salk. 547. S. C. Carth. 142. S. C. Holt, 752. Cro. Eliz. 666. Moor, 907. 1. Roll. Rep. 12. 2. Roll. Rep. 414. 5. Mod. 272. 1. Bac. Abr. 618, 619. 2. Bac. Abr. 293. 3. Bac. Abr. 489. 4. Bac. Abr. 261. 1. Ld. Ray. 220. 2. Ld. Ray. 1161. 1172. 1211. Cowp. 422. 1. Term Rep. 550. 2. Term Rep. 473. 3. Term Rep. 3. 315. 4. Term Rep. 389.

SHOTTER *against* FRIEND AND HIS WIFE.

The queſtion was, Whether upon the whole matter the defendant ſhould have *a conſultation*? or whether *a prohibition* ſhould be granted, becauſe the proof by *one witneſs* was denied by that court?

IT WAS ARGUED, that the defendant ſhould not have *a conſultation*, becauſe matters teſtamentary ought to have no more favour than things relating to tithes, in which caſes the proof by one witneſs has been always held good. * [284] * So it is in a releaſe to diſcharge a debt, which is well proved by a ſingle teſtimony, and it would be very inconvenient if it ſhould be otherwiſe; for feoffments and leaſes may come in queſtion, which muſt not be rejected, becauſe proved by one witneſs. A *modus decimandi* comes up to this caſe, upon the ſuggeſtion whereof prohibitions are never denied; and the chief reaſon is, becauſe the ſpiritual court will not allow a *modus* to be any diſcharge of tythes of kind. The courts of equity in *Weſtminſter Hall* give relief upon a proof by one witneſs; ſo likewiſe do the courts of the common law, if the witneſs is a good and credible perſon. It is true, a prohibition ſhall not go upon a ſuggeſtion that the eccleſiaſtical court will not receive the teſtimony of a ſingle witneſs, if the queſtion is, upon proof of a legacy deviſed, or marriage or not, or any other thing, which originally doth lie in the cognizance of that court; but payment or not payment is a matter of fact triable at the law, and not determinable there; if therefore they deny to take the evidence of a ſingle witneſs, a prohibition ought to go *(a)*.

*1. Vern. 301. 8. Mod. 194. 10. Mod. 12. 439. 11. Mod. 5. 12. Mod. 13. 232. 206. 236. 1. Stra. 187.

SECONDLY, The ſentence is no obſtacle in this caſe, becauſe the plaintiff had no right to a prohibition until the teſtimony of his witneſs was denied, and ſentence thereupon given; and this is agreeable to what has been often done in caſes of the like nature. As for inſtance, prohibitions have been granted where the proof of a releaſe of a legacy by one witneſs was denied *(b)*. So where the proof of payment of tythes for pigeons was denied upon the like teſtimony *(c)*. So where a ſuit was for ſubſtraction of tithes, and the defendant pleaded that he ſet them out, and offered to prove it by one witneſs, but was denied, a prohibition was granted *(d)*. And generally the Books are, that if the ſpiritual court refuſe ſuch proof, which is allowed at the common law, they ſhall be prohibited *(e)*. There is one caſe againſt this opinion, which is that of *Roberts* in 12. *Co.* 65. but it was only a bare ſurmiſe, and of little authority.

Thoſe who argued on the other ſide held, that *a conſultation* ſhall go, and that for two reaſons.—FIRST, Becauſe a prohibition is prayed after ſentence.—SECONDLY, Becauſe the eccleſiaſtical court have an original juriſdiction over all teſtamentary things. * [285] * As to THE FIRST POINT, it is plain that if that court proceed contrary to

(a) 2. Inſt. 608.

(b) Bagnal *v.* Stokes, Cro. Eliz. 88. Moor, 907.

(c) Mallory *v.* Marriot, Cro. Eliz. 666. Moor, 413.

(d) Moor, 413. 2. Roll. Rep. 439. 5. Bac. Abr. 99.

(e) 2. Roll. Abr. 299, 300. Yelv. 92. Latch. 117. 3. Bulſt. 242. Hutton, 22. 2. Roll. Rep. 42. Cro. Eliz. 666. 1. Show. 158. 2. Salk. 547.

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to those rules which are used and practised at the common law, yet no prohibition ought to go after sentence, but the proper remedy is an appeal.—SECONDLY, It cannot be denied, but that that court had cognizance of the principal matter in this case, which was a legacy, and payment or not is a thing collateral. Now wherever they have a proper jurisdiction of a cause, both that and all its dependences shall be tried according to their law, which rejects the proof by a single witness. This was the opinion of POPHAM and WILLIAMS, *Justices*, in those times when most of the cases cited *on the other side* were under debate. In the case of *Brown v. Wentworth* (*a*), a revocation of a will was offered to be proved by a single witness in the spiritual court; which being denied, a prohibition was prayed in the king's bench, but denied, because the will being the principal matter of which that court had an original jurisdiction, therefore the revocation thereof, which was a collateral matter, but depending upon the principal, shall be tried there; for when the original belongs properly to their determination, all dependences thereon shall follow it, and be tried by them according to their law. In *Easter Term* in the fourth year of *Charles the First* this came to be a question again (*b*); it was upon a libel for a legacy, and *plene administravit* pleaded, which they endeavoured to prove by the testimony of a single witness, and denied. In that case CROKE and YELVERTON, *Justices*, were against the prohibition, because a suit for a legacy was a thing merely spiritual, and payment thereof is of the same nature; so that the ecclesiastical court has a proper jurisdiction both of the matter and the proof. By these instances it may be seen that it is not yet a settled point that a proof by one witness in that court is good; for prohibitions have been both granted and denied (*c*). It cannot be a reason to grant a prohibition to the spiritual court for refusing such proof which is allowed at the common law, because though the proof by a single witness is allowed at the law, yet it is not a conclusive evidence, because the jury, who are of the vicinage, are supposed to know the fact, and may give a verdict upon that knowledge without proof or witness, as well as where there is but one.

* THE COURT, in *Michaelmas Term* following, were all of opinion, that no *consultation* ought to go; for as where the ecclesiastical court proceeds upon things merely spiritual no prohibition is to be granted, as in suits about probates of wills, &c. so where they meddle with temporal matters, or refuse to admit such proof which is allowed at the common law, no consultation shall go. If the law should be otherwise, it would be inconvenient for all executors and administrators; for if they should be compelled to prove payment of debts by two witnesses, they might often fail of that proof, and so pay the money twice. Such proof which is good at the common law ought to be allowed in their court, and at the common law it is not necessary to prove a payment of a debt by two witnesses. They may follow their own rules concerning things which are originally in their cognizance; but if any collateral matter arises, as concerning a revocation of a will, or * [286]

(*a*) Yelv. 92. (*b*) Cro. Jac. 264. 12. Co. 67. (*c*) Hetley, 87. 1. Sid. 161.

 payment

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payment of a legacy, if the proof be by one witneſs they ought to allow it. Tithes are of eccleſiaſtical cognizance; now if a libel ſhould be brought for ſubſtraction of tithes, and the defendant proves by one witneſs, that he ſet them out from the nine parts, though the parſon had not any notice of it (which he is not to have at the common law, though it is otherwiſe by their law), that court muſt allow this proof, otherwiſe a prohibition muſt go.

As to the other point, a prohibition may be granted as well after as before ſentence, but the ſentence in this caſe is the very ground of the prohibition.

DOLBEN, *Juſtice*, cited a caſe of *Richardſon v. Deſborow* in the king's bench, *Hil.* 1675; which was, A deviſe of a legacy of one hundred pounds; the executor was ſued, who pleaded, that the teſtator owed another perſon the like ſum of one hundred pounds upon bond, which being paid he had not aſſets *ultra:* and upon proof in the ſpiritual court it appeared there was but one witneſs to the bond; which not being a good proof of it in their law, there was a ſentence for the payment of the legacy, and afterwards a prohibition was granted upon the ſuggeſting of this matter (*a*).

(*a*) See Argyle *v.* Hunt, 1. Stra. 187.; Full *v.* Hutchins, Cowp. 422.; Blacquiere *v.* Hawkins, Dougl. 377.; Darby *v.* Coſens, 1. Term Rep. 552.; Ladbroke *v.* Cricket, 2. Term Rep. 649.

*[287]

Caſe 189.

* Aſhcomb *againſt* the Inhabitants of the Hundred of Elthorn.

Hilary Term, 1. *Will. & Mary, Roll* 901.

If a ſervant, or his bailee, in company of each other, be robbed of his maſter's money, the maſter, or the ſervant, may, by the ſtatute of Winton, maintain an action of HUE AND CRY againſt the hundred; but the *oath* required by 27. *Eliz.* c. 13. muſt be made by both the ſervant and the bailee.—S. C. Carth. 145. S. C. 1. Show. 94. 241. S. C. Salk. 613. S. C. Holt, 460. 637. Cro. Eliz. 142. 1. Leon. 323. 4. Mod. 403. 10. Mod. 110. 386. 11. Mod. 261. 12. Mod. 54. 2. Barnes, 371. Ld. Ray. 826. 904 2. Stra. 1170. 1247. 3. Com. Dig. 475, 476.

AN ACTION was brought upon the *ſtatute of Winton* (*a*) for a robbery done in the pariſh of *Harmondſworth* in *Longford Lane* in the ſaid hundred.

The caſe was thus: The plaintiff employed one *Coxhead* his ſervant to ſell fat cattle in *Smithfield*, who ſold them for one hundred and ſix pounds, which money he delivered tied up in two bags to one *Strange* a quaker, who was robbed in the company of *Coxhead*; he being alſo robbed of twelve ſhillings. They both gave notice of this robbery to the inhabitants of the next village, and *Coxhead* was examined by the juſtice of the peace dwelling in the county and hundred where the robbery was committed, purſuant to the ſtatute, &c. (*b*) before whom he made

(*a*) 13. *Edw.* 1. c.

(*b*) By 8. *Geo.* 2. c. 16.

oath

oath, that he did not know any of the robbers; but *Strange*, being a quaker, refuſed to be examined upon oath. *Mr. Aſhcomb* the maſter brought an action againſt the hundred, and all this matter was found ſpecially.

ASHCOMB against THE INHABITANTS OF THE HUNDRED OF ELTHORN.

The queſtion was, Whether the action was well brought in the name of the maſter; and ſo whether the hundred ſhould be liable to pay the money of which *the quaker* was robbed, he refuſing to be examined upon oath?

In this caſe the ſtatute of 27. *Eliz.* c. 13. was conſidered, which was made in favour of the hundred; for it enacts, "that "the party robbed ſhall not maintain any action againſt the hun- "dred, except he give notice of the robbery with convenient "ſpeed to the inhabitants of ſome town, vill, or hamlet, near the "place where he was robbed; and except within twenty days "next before the action brought he be examined upon oath be- "fore a juſtice of the county inhabiting in the hundred where the "robbery was committed, or near the ſame, whether he knew "the parties who robbed him, or either of them." It was agreed that the maſter may have an action for a robbery committed upon the ſervant, but that is by virtue of the *ſtatute of Winton* (*a*). The *Caſe of Jones* againſt the hundred of *Bromley* (*b*) is to that purpoſe, which was a robbery upon himſelf, wife, and ſervant, the money being taken from the ſervant; and the maſter made oath that he did not know any of the robbers, but it happened the ſervant did know one of them whoſe name was *Leonard*, of which he did then inform his maſter; and this matter appearing to the jury, it was found ſpecially; and upon * the argument of that ſpecial verdict theſe points were reſolved:—FIRST, That the oath of the maſter without the ſwearing of his ſervant is good, becauſe the ſervant had only the bare cuſtody of the money.—SECONDLY, That the information then given by the ſervant to the maſter, of his knowledge of one of the robbers, did not oblige the maſter, becauſe the money ſhall be ſaid to be in his poſſeſſion and not of the ſervant, the maſter being then preſent, which is all the difference between that caſe and this at the bar; ſo that the maſter is the perſon robbed within the meaning of the *ſtatute of Winton*, although the money be in the hands of the ſervant. Suppoſe the ſervant had received a thouſand pounds, and not being able to carry it himſelf had employed ten men, each to carry one hundred pounds, and they had been all robbed, the owner may have an action againſt the hundred upon the affidavit of one of the perſons robbed: the reaſon is, becauſe the poſſeſſion ſhall follow the property, and the poſſeſſion of the whole will follow every part. There are authorities to prove, that if the ſervant be robbed, the maſter may give evidence what money was delivered to him, though that

* [288]

(*a*) Cro. Car. 38. Latch. 127. Stiles, 156. 4. Mod. 305. 2. Leon. 82. 2. Brownl. 155. Salk. 613.

(*b*) In the year 1658, Carth. 146.

might

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be as well proved by another witness (*a*). Now though all this be admitted, yet an action will not lie against the hundred by the master in the case at the bar; for the *statute of Queen Elizabeth*, being made so much in favour of the hundred, ought to be pursued. The reasons why an oath is injoined by that statute are,—First, That the person robbed should enter into a recognizance to prosecute the robbers, if he knew them, or any of them.—Secondly, That the hundred might be excused upon the conviction of such person or persons.—Thirdly, To prevent a robbery by fraud. Now suppose the servant is intrusted with money, and robbed by confederacy, shall the hundred be answerable because the servant has broke his trust? No, the servant ought to be sworn for the purposes mentioned in that act, which if he refuse, the master has lost his action (*b*). But if the servant be robbed in the company or presence of his master, the money is still in judgment of the law in the possession of the master, and that was the reason of the judgment in *Jones's Case* (*c*). This is not like the case of a common carrier, who though he may be said to be a servant, yet he is entrusted by this law.

* [289] Brownl. 155.

* Curia. This action might have been well brought for the whole by *Coxhead* alone (but it is now too late, the year being expired); for where a servant is robbed of part of his master's goods and part of his own, he may have an action, and recover judgment, for the whole.

And therefore at another day the plaintiff had judgment for twenty-six shillings only.

(*a*) 2. Roll. Abr. 685. (*b*) Green's Case, Cro. Eliz. 142. 1. Leon. 323.
(*c*) Stiles, 156. 319.

Case 190.

Pain *against* Patrick and Others.

Easter Term, 2. Will. & Mary. Roll 43.

Action on the case will not lie for disturbing or hindering a passage in a common highway, except some special damage ensue; but the remedy must be by indictment.
S. C. 1. Show. 243. 255.
S. C. 1. Salk. 12.
S. C. Comb. 180.
S. C. Carth. 1. 191. S. C. Holt, 6. S. C. Ray. Ent. 439. 10. Mod. 150. 382. Comyns, 58. 114. 1. Ld. Ray. 488. 473. 2. Ld. Ray. 1091. 1169. 1390. 1. Com. Dig. 129. 201.

THIS was a special action on the case brought by *Isaac Pain* against *Edward Patrick* and *William Boulter* for hindering the plaintiff to go over a ferry: the declaration sets forth, that the vill of *Littleport*, in the *Isle of Ely*, is an ancient vill, within which there is a river called *Wilner River*, over which there was an ancient passage in a ferry-boat, from the north-east part of the said vill to the end of *Ferry Lane*, and from thence to another place called *Adventurers Bank*; that this passage was for all people at a certain price, &c. excepting the inhabitants of *Littleport* living in ancient houses there, who, by reason of an ancient custom in the said vill, were to pass *ad libitum suum* without paying toll, &c.; that the plaintiff was an inhabitant in an ancient messuage in the said vill, and that there was an ancient ferry-boat kept there by the

owners

owners thereof, till the first day of *May* in such a year; after which day the defendants did not keep the same, *per quod* the plaintiff lost his passage, &c.

The defendants, *protestando* that the passage was not in a ferry-boat, *protestando etiam* that there was no such custom, &c. and that the plaintiff was not an inhabitant in an ancient messuage in *Littleport*, for plea say, that before the exhibiting of the bill they did erect a bridge over the said river where the passage was anciently, and this was done and maintained at their own costs, and that the plaintiff *melius et celerius* could pass over the said bridge, &c. This was pleaded in bar.

The plaintiff replied, that he *per aliquem pontem libertatem passagii trans et ultra rivum prædict. secundum consuetudinem præd. in narratione mentionat. habere non permissus fuit contra consuetudinem præd. Et hoc paratus est verificare, &c.*

* The defendants demurred; and the plaintiff joined in demurrer. * [290]

THE QUESTIONS were:

FIRST, Whether this was a good custom, as laid in the declaration, for the inhabitants of a vill to claim to be discharged of toll *ratione commorantiæ?*

SECONDLY, If the custom is good, then, Whether the defendants plea in bar is also good to discharge themselves from keeping of the boat?

THIRDLY, Whether the plaintiff can maintain this action?

This case was argued now, and in *Easter Term* following, by Counsel for the defendants, and in the same Term by Counsel for the plaintiff.

Those who argued *for the defendants* said, that as to the first point, though this is set forth by way of *custom*, yet it is in the nature of a *prescription*, which is always alledged in the person; but here it is for the inhabitants of a vill, &c. Now this cannot be good by way of *prescription*, because in such case there must be a certain and permanent interest abiding in some person, which cannot be here; for a mere habitation or dwelling in an house will not give a man such an interest. That which makes a prescription good is usage and reasonableness (*a*), but it cannot be *ex rationabili causâ* to prescribe *ad libitum suum*, for the ferry-man has neither any consideration or recompence for the keeping of his boat, when the inhabitants may pass over at their pleasure without paying toll. It is true, a man may prescribe to have common *sans nombre*, which in strictness is to put in as many cattle as he will; but if he lays his prescription *ad libitum suum*, it is not

10. Mod. 133. 158. 229. 300. 11. Mod. 53. 72. 168. 12. Mod. 35. 249. 1. Ld. Ray. 406.

(*a*) 1. Leon. 142. 3. Leon. 41.

good.

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good (*a*). If therefore this is not good by way of *prescription*, it cannot be supported by *custom*, because that also must extend to what has some certainty, and which must likewise have a reasonable beginning (*b*). Now there can be no certainty in this custom, because the plaintiff claims it only during his *commorancy* in a messuage in which he had neither a certain time or estate, and this is such a transitory interest which is not allowed in the law (*c*). And therefore it has been adjudged, that a custom for an infant to sell his lands when he can measure an ell of cloth is void (*d*), because it is uncertain of what age he may then be; and it is equally as uncertain, how long a man may live in one of these
*[291] ancient houses. * Such a custom might be good in point of tenure; for it might have a reasonable commencement between lord and tenant; but this cannot be good as laid in this declaration, for several reasons.—FIRST, Because it is not alledged that the defendants of right ought to keep a boat there, or that it was necessary for them to be always attending, for possibly it might require the use of skilful men; and therefore in all actions brought for not repairing of ways, it is alledged that the defendant *reparare debuit*.—SECONDLY, Because it brings a charge without any recompence, and this must be very unreasonable. It is true, that a custom for fishermen to dry their nets upon another man's ground is good (*e*), which may seem to be a charge upon the land without any reward; but the reason is, because the catching of fish is for the public benefit, and every man may have advantage by it. A custom to have *solam et separalem pasturam* has been formerly doubted whether good or not; but it is now held to be good (*f*), because the lord of the soil might have some other recompence for it.—THIRDLY, Because it is unlimited, for the tenants may pass and re-pass *ad libitum* according to this custom; but it ought to be laid for their necessary occasions, for otherwise the defendants may be deprived of their freehold, because the tenants may always keep the boat in use.

12. Mod. 15 198. 409. 1. Stra. 44. 181. 187. Ld. Ray. 851 922.

THE SECOND POINT was not much insisted on, which was, as to the matter of the plea; only it was said, that it was not so well to take away the whole prescription; that the plea might have been good, if it had been *quousque* the bridge fall or decay, then the prescription revives again.

THE THIRD POINT. Then supposing the declaration to be sufficient, yet as this is upon the record the plaintiff could not have this action, because he had set forth this to be a public and common ferry for all people to pass, and that he was hindered, but does not shew any particular damage, and therefore can have no cause of action. It is like the case of a common highway which is

(*a*) Meller *v*. Staples, 1. Mod. 6.
(*b*) See Fisher *v*. Wren, ante, 250.
(*c*) Hob. 86. 6. Co. 60.
(*d*) Godbolt, 14. 3. Com. Dig. "Enfant" (B 6.). See the case of Zouch *v*. Parsons, 3. Burr. 1794.
(*e*) See the Year Book 8. *Edw*. 4. pl. 18. Bro. Abr. "Customs" pl. 46.
(*f*) Ante, 246. 250. 1. Mod. 75.

out-

out of repair, for which no man can bring an *action*, unleſs he has a particular damage or loſs more than the reſt of the people paſſing that way (a), but the party ought to be *indicted*; and this is to prevent multiplicity of ſuits; for if one man may have an action, every perſon travelling that way may have the like. FAIR *against* PATRICK AND OTHERS.

ANOTHER EXCEPTION was taken to the declaration, *viz.* that all the cuſtom is laid to be for the inhabitants of an ancient vill * to paſs toll-free FROM *Ferry Lane* TO *Adventurers Bank*, and they do not alledge that bank to be within the vill (*b*). * [292]

Thoſe who argued *for the plaintiff* held this to be a good cuſtom, as ſet forth by him, and as ſuch it is not confined to the ſame rules with a preſcription, which muſt have a lawful commencement; but it is otherwiſe in a cuſtom, for it is ſufficient if it be certain and reaſonable. The caſes cited on the other ſide are not to this purpoſe, becauſe they concern only ſuch cuſtoms which relate to ſome intereſt or profit in the land of another perſon, but this cuſtom is only in a matter of exemption and eaſement. This was the very difference taken by the Judges in *Gatewood's Caſe* (*c*), where it was held to be a good cuſtom for every inhabitant of a particular town to have a way over ſuch lands to go to church or market, becauſe this was matter of eaſement and no profit. Now a paſſage over a river is no more than a way, and may be tied up to one or more perſons, according to their commorancy (*d*). Since therefore no intereſt is claimed by the plaintiff, but only an eaſement, this preſcription need not be laid in the owners, but in the inhabitants of the vill of *Littleport*. It may be compared to a caſe where a cuſtom was laid for the inhabitants of a town to pay a *modus* in diſcharge of tithes; this was held good (*e*), becauſe it was by way of diſcharge in the perſons lands, without claiming any profit in that of another. It is alſo like the common caſe of a market; when a man has pitched his ſtall there, no perſon can remove it, for he has a right *ratione commorantiæ*.

12. Mod. 35. 249. Ld. Ray. 1400. Stra. 957. 1145. 1224.

Ld. Ray. 725.

Then as to the firſt objection upon the firſt point, That a cuſtom to paſs and repaſs *ad libitum* cannot be good, it was anſwered, this paſſage was in the nature of a highway, over which a man may paſs as often as he will; and therefore it is well enough as laid in the declaration.

As to the objection, that it ought to be laid in ſome perſon, and not in the inhabitants, it was ſaid this was an eaſement to the plaintiff, and no ſuch thing can be to one man but it makes another a treſpaſſer, and it is no intereſt in the plaintiff to be diſcharg-

(*a*) 27. *Hen.* 8. pl. 27. Co. Lit. 56. Moor, 168. Cro. Eliz. 664. 5. Co. 104. —See Ruſſel *v.* the Men of Devon, that an action will not lie by an individual of a county againſt the inhabitants of a county, for an *injury* ſuſtained in conſequence of a *county bridge* being out of repair, 2. Term Rep. 667.

(*b*) See Rex *v.* Gamlingay, where an indictment againſt the pariſh of *B.* for not repairing a road "leading *from* A. *to* B. was held to be excluſive of *B.* and therefore bad, 3. Term Rep 513.

(*c*) 6. Co. 59. 4. Term Rep. 717.

(*d*) See Tripp *v.* Frank, 4. Ter. Rep. 666.

(*e*) Hob. 118. Yelv. 163.

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ed of a charge. A cuſtom to grind at the lord's mill diſcharged of toll, rules this caſe; for is it not as much charge for a lord of a manor to keep a mill, as for the defendant to keep a boat? * If the plaintiff had preſcribed, then this had come within the rules

* [293] of *Gatewood's Caſe* (*a*). But he has alledged a cuſtom, and when ſuch allegations are made, they ought not to be too narrowly ſearched for: no reaſon can be given why an infant at fifteen years of age ſhall be capable to make a feoffment in one town and not in another (*b*).

Then as to THE THIRD POINT, that this being laid to be a common ferry, the plaintiff ought to ſhew ſome ſpecial damage to maintain an action. To which it was anſwered, that the right was on the plaintiff's ſide, and that was ſufficient to maintain the action. It is not like the caſe of a common highway, as mentioned on the other ſide, becauſe this action is confined to *Littleport* alone, and no man is intitled to it but ſuch who inhabit that vill, ſo that every man cannot bring an action.

As to the exception to the form of the declaration, that *Adventurers Bank* is not laid to be *in* the vill, it was ſaid, that the plaintiff only claimed a right of paſſage over the river, which is laid to be in the vill of *Littleport*, the bank is only the *terminus ad quem*; it is like the caſe where the defendant covenanted to repair a mill and the water-courſes in a pariſh, and alſo the banks belonging to the mill, in which caſe the plaintiff had judgment (*c*), though he did not ſhew in what *vill* the banks were, becauſe it ſhall be intended to be in the ſame vill where the mill was.

Afterwards in *Trinity Term* 3. *Will. & Mary*, judgment was given for the defendant, *abſente* DOLBEN, *Juſtice*, who was alſo of the ſame opinion.

IT WAS HELD that the cuſtom was well alledged, both as to the manner and matter: it is true, all cuſtoms muſt have reaſonable beginnings, but it would be very difficult to aſſign a lawful commencement for ſuch a cuſtom as this is; ſo it would be for the cuſtom of *gavelkind*, or *borough Engliſh*, which are circumſcribed to particular places; and ſince it is ſufficient to alledge a cuſtom, by reaſon of the place where it is uſed, it may be as reaſonable in this caſe to ſay that there has been an ancient ferry-boat kept in this place; it is but only an inducement to the cuſtom, which did not conſiſt ſo much in having a right to the paſſage, as to be diſcharged of toll. This might have a lawful beginning, either by a grant of the lord to the anceſtors of the defendant, or by the agreement of the inhabitants. * A cuſtom alledged for all the occupiers of a cloſe in ſuch a pariſh to have a

Stra. 1228. 1. Salk. 12.

* [294]

(*a*) 6. Co. 59. b.
(*b*) 18. *Edw.* 4. pl. 3.
(*c*) Brent *v.* Haddon, Cro. Jac. 555. and Breſſey *v.* Humfries, Cro. Jac. 557.

foot-way,

foot-way, &c. is not good *(a)*; the reason is, because the plaintiff ought to prescribe in him who has the inheritance; but where a thing is of necessity, and no manner of profit or charge in the soil of another, but only a thing in discharge, or for a way to a market, or to be quit of toll, in such cases not only a particular person but the inhabitants of a vill may alledge a prescription. This may be as well alledged as a custom to turn a plow upon another man's land, or for a fisherman to mend his nets there. It is good as to the matter, for it is only *an easement*; it is like a custom alledged for a gateway or water-course, and for such things inhabitants of a vill, or all the parishioners of a parish, may alledge a custom or usage in the place *(b)*.

PAIN *against* PATRICK AND OTHERS. 1. Ld. Ray. 386. 406. 2. Ld. Ray. 1169.

SECOND POINT. But as to the plea in bar, it is not good, because the erecting of a bridge is but laying out a way; it is a voluntary act, and no man by reason of his own act can be discharged of what he is to do, upon the interest he hath in the ferry. If the defendant had petitioned the king to destroy the ferry, and got a patent to erect a bridge, and had brought a writ *ad quod damnum*, and it had been found by inquisition to be no damage to the people, then he might safely have built this bridge.

THIRD POINT. But notwithstanding the plea is not good, yet the plaintiff can have no advantage of it, because he cannot have an action on the case for this matter; for by his own shewing, it is a common passage, which is no more than a common highway: now for disturbing him in such a passage, no action on the case will lie, unless he had alledged some particular damage done to himself *(c)*; for if he could maintain such an action, any other person is entitled to the like; and this would be to multiply suits, which the law will not allow, but hath provided a more apt and convenient remedy, which is by presentment in the leet. If toll had been extorted from him, then an action on the case had been the proper remedy *(d)*, but no such thing appeared upon this declaration.

(a) Baker *v.* Breieman, Cro. Car. 419. Co. Lit. 110. Cro. Eliz. 746. 1. Roll. Rep 216.

(b) Gateway *v.* Michel, Cro. Eliz. 441. S. C. Owen, 71.

(c) Cro. Car. 132. 167. Co. Lit. 56. Cro. Eliz. 664. 13 Co. 33. Davis, 57.—See also 1. Roll. Abr. 88. 110. 2. Roll. Abr. 140. Moor, 180. 4. Co. 18. 9. Co. 113. Vaugh. 341. Carth. 191. Salk. 15. 2. Stra. 909. 1004. 1. Ld. Ray. 486. Comyns, 58. 3. Bac Abr. 668.

(d) See Year Book 22. *Hen.* 6. pl. 12. and Fitz. Nat. Brev. 94.

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* Prince's Case.

Case 191.

THE SUGGESTION IN A PROHIBITION was, that *Prince* was seised of the rectory of *Shrewsby ut de feodo et jure*, and that he being so seised *de jure*, ought to present a vicar to the said place, but that the bishop of the diocese had, of his own accord, appointed a person thereunto.

Prohibition. Fitzg. 169. 250. 1. Vern. 42. 247. 2 Ld. Ray. 801. 1. Peer. Wms. 774. 1. Te 650.

This exception was taken to it, *viz.* he does not say that he was *impropriator*, but only that he was seised of the rectory in fee; so it

PRINCE'S CASE. it not appearing that he had it impropriate, he ought not to present the vicar.

DOLBEN, *Justice*, replied, That in several places in *Middlesex* the *Abbot of Westminster* sent monks to say mass, and so the vicarages were not endowed, but he put in and displaced whom he pleased; and that he had heard my LORD CHIEF JUSTICE HALES often say, that *the Abbot* had as much reason to displace such men, as he had his butler or other servant.

CURIA. Declare upon the prohibition, and try the cause.

Case 192.

Harrison *against* Hayward.

Easter Term, 2. Will. & Mary. Roll 187.

On a promise to assign upon request, the defendant cannot plead that he was ready to assign after the promise made.

AN AGREEMENT was made to assign a stock upon request; and for non-performance an action was now brought, setting forth the agreement, and that the plaintiff did request the defendant at such a time, &c.

The defendant pleaded, that he was ready to assign the stock after the promise made, &c. and a demurrer.

8. Mod. 173. 10. Mod. 519. 12. Mod. 400. 413. 1. Ld. Ray. 596. 2. Ld. Ray. 1095. 1140. 1. Stra. 569 616. 712.

It was ruled, if the thing was not to be done upon request, then the defendant was bound to do it in a convenient time after the promise; but it being to be done upon request, the time when the plaintiff will require the performance of the agreement is the time when the defendant must do it.

Judgment for the plaintiff.

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Case 193.

* Thompson *against* Leach.

A. being tenant for life, with remainders to his first and other sons, remainder to *B.* in tail, executes a deed without the knowledge and assent of *B.* and before a son is born, by which he surrenders the estate to *B.*; *A.* continues in possession until after the birth of a son, and then agrees to the surrender, enters upon the estate, and suffers a recovery.—This surrender by the tenant for life immediately vests the estate in the remainder-man in tail, and thereby destroys the contingent remainders to the first and other sons of *A.*; the *actual assent* of the *surrenderee* not being necessary to the perfection of the *surrender*; for that shall be presumed, unless his *dissent* appears.—S. C. 2. Vent. 198. 205. S. C. 1. Show. 297. S. C. 3. Lev. 284. 2. Roll. Abr. 618. 793. 1. Co. 66. 137. Moor, 554. 2. Lev. 39. 4. Mod. 284. 2. Saund. 380. Comyns, 45. 1. Burr. 124. Fearne C. R. 467. 469. Dougl. 139.

WRIT OF ERROR upon a judgment in ejectment given in the common pleas.

The case upon the special verdict was thus: *Simon Leach* was tenant for life of the lands in question, with remainder in contingency to his first, second, and third son in tail male; remainder to *Sir Simon Leach* in tail, &c. This settlement was made by the will of *Nicholas Leach*, who was seised in fee. The tenant for life, two months before he had a son born, did in the absence

of *Sir Simon Leach*, the remainder man in tail, seal and deliver a writing, by which he did "grant, surrender, and release" the lands which he had for life, to the use of *Sir Simon Leach* and his heirs, and continued in possession five years afterwards; and then, and not before, *Sir Simon Leach* did accept and agree to this surrender, and entered upon the premisses. But about four years before he thus agreed to it, *Simon Leach*, the tenant for life, had a son born named *Charles*, lessor of the plaintiff, to whom the remainder in contingency was thus limited. The tenant for life died; and then *Sir Simon Leach* suffered a common recovery in order to bar those remainders.

The questions were,

FIRST, Whether this was a legal and good surrender of the premisses, to vest the freehold immediately in *Sir Simon Leach*, without his assent, before *Charles Leach* the son of *Simon Leach* the surrenderor was born, so as to make him a good tenant to the *præcipe*, upon which the recovery was afterwards suffered? If so, then the contingent remainders to the first and other sons is destroyed.

SECONDLY, If the estate was not vested in the surrenderee till his actual assent, such assent shall not relate (though after the execution of the deed) so as to pass the estate at the very time it was sealed and delivered?

Judgment being given in the common pleas, by the opinion of THREE JUSTICES, against VENTRIS, *Justice*, that the contingent remainder was not destroyed by this surrender, because it was not good without the acceptance, and till the actual assent of the surrenderee;

This WRIT OF ERROR was now brought upon that judgment.

* This case depended several Terms, and THOSE WHO ARGUED *to maintain the judgment* insisted, that here was neither a mutual agreement between the parties, nor acceptance nor entry of the surrenderee, which must be in every surrender, these being solemn acts required, in such cases, to the alteration of possessions, and to prevent frauds. That the law has a greater regard to the transmutation of possessions, than to the alteration of personal things, and therefore more ceremonies are made requisite to that, than to transfer a chattel from one to another. In all feoffments there must be livery and seisin: so in partitions and in exchanges, which are conveyances at the common law, no estate is changed until an actual entry, though in the deed itself such entry is fully expressed (a). Here the surrenderee is a purchaser of the estate, and yet did not know any thing of it, than which nothing can be more absurd. It is admitted, that every gift and grant enures to the be- [297]

(a) *Quære*; for if tenant for life surrender to him in reversion, the surrenderee hath a freehold in law in him before entry, Co. Lit. 266. b.—*Note to the* FORMER EDITION.

THOMPSON *against* LEACH. nefit of the donee and grantee, but not where the assent of the parties is required to complete the act. Assent and dis-assent are acts of the mind: now it is impertinent to say that a man gave his assent to a thing which he never heard. A lease for years is not good without entry, nor a surrender without acceptance *(a)*.

8. Mod. 55. 10. Mod. 124. 174. 265. 432. 11. Mod. 276. Prec. Ch. 313. 2. Vern. 519. Gilb. E. R. 256. 1. Peer. Wms. 516. 2. Peer. Wms. 427. 3. Peer. Wms. 186. 305. 372. 1. Stra. 165. 227. 534. 2. Stra. 859. 955.

It is no new thing to compare a surrender to the resignation of a benefice: now if an incumbent should resign to the ordinary, and the patron should afterwards present to that living, such presentation is void, if the ordinary had not accepted the resignation *(b)*: the reason is, because a resignation does not pass the freehold to the bishop, but puts it only in abeyance till his acceptance; and it is not an objection to say that this is grounded upon an ecclesiastical right, and not at the common law, or that *a formedon* will not lie of a rectory; for though it is of ecclesiastical right, yet it is of temporal cognizance, and shall be tried at law. The precedent in *Rastal (c)* may be objected, where the surviving lessee for years brought an action of covenant against the lessor, for disturbing of him in his possession, and the lessor pleaded a surrender to himself without an acceptance; but the plaintiff, in that case, said nothing of a surrender *(d)*. In the same book a surrender was pleaded *ad quam quidem sursum redditionem* the plaintiff *agreavit*: so in *Fitzherbert's Abridgment* issue was joined upon

[298] the acceptance, which shews it is a material point. * No inconvenience can be objected, that an assent is made a legal ceremony to a surrender, for it is not inconvenient even in the case of an infant, who, by reason of his non-age, is not capable to take such a conveyance, because he cannot give his assent, but he may take the land by way of feoffment, or grant, or any conveyance of like nature, without his assent. By the very definition of a surrender, it plainly appears that there must be an assent to it; for it is nothing else but a yielding up of an estate to him who has the immediate reversion or remainder, wherein the estate for life or years may drown by mutual agreement between the parties *(e)*.

Stra. 1201. It is true, an agreement is not necessary in devises, nor in any other conveyances which are directed by particular statutes, or by custom; but it is absolutely necessary in a surrender, which is a conveyance at the common law. It is such an essential circumstance, that the deed itself is void without it; it is as necessary as an attornment to the grant of a reversion, or an entry to a deed of exchange, which are both likewise conveyances at the common law. There are various circumstances in the Books *(f)* which declare what acts shall amount to an acceptance or agree-

(a) Lane, 4. 3. Co. 43.

(b) Cro. Jac. 198. Dyer, 294. Brooke's Abr. tit. "Bar," 81. Yelv. 61. 1. Sid. 387

(c) Rastal's Entries, title, "Covenant," 136.

(d) Owen, 97. Dyer, 28 Rastal's Ent. tit. "Debt," 183. 176, 177. Brooke Abr. tit. "Surrender," 39. Cro Car. 101. Fitz. Abr. "Bar," 262. Coke's Ent. 335.

(e) Co. Lit. 337. Bro. Abr. "Surrender," pl. 45. Dyer, 110. Fitz. Abr. 39. 2. Vent. 206. Perkins, f. 584. 3. Bac. Abr. "Leases," 457.

(f) Cro. Eliz. 488. Owen, 97. 31. Assize, pl. 26.

ment;

ment; but it was never yet doubted, but that an acceptance was necessary to a surrender. So in the entries *(a)*, a surrender is sometimes pleaded without an acceptance; but it is always that the surrenderee, by virtue of the surrender, *expulit et ejecit* the plaintiff, which amounts to an agreement. The law is so careful in these conveyances, that it will not presume an assent without some act done *(b)*; if therefore a deed cannot operate as a surrender without an acceptance, then in this case no such shall be presumed, because the jury have found it expresly otherwise. Then by the birth of *Charles Leach*, the contingent remainder is vested in him, which arising before the assent of the surrenderee, makes such assent afterwards void, for there can be no intermediate estate. Besides, if an assent should not be necessary to a surrender, this inconvenience would follow, *viz.* if a purchaser should take in several mortgages and extents, and keep them all on foot in a third person's name (which is usual) to prevent mesne incumbrances, and the mortgagor should afterwards surrender his estate without the assent of the purchaser, if this should be held a good conveyance in law, it would be of very mischievous consequence. Ld. Ray. 1145.

* SECONDLY, If the estate be not immediately transferred to the surrenderee at the sealing of the deed without the assent of the surrenderor, it shall not pass afterwards when he gives his consent, and that by way of relation; for if that should be allowed, then the surrenderor might have kept the deed in his pocket, as well fifty as five years after the execution thereof, which would be so prejudicial, that no man could be assured of his title. It is true, when a *bargain and sale* is made of land, such a day, &c. and two days afterwards the bargainor enters into a recognizance, and then the deed is enrolled within the six months, by this means the conusee of the statute is defeated; for after the enrollment the land passes *ab initio*, and the bargainee in judgment of law was seised thereof from the delivery of the deed, but not by way of relation, but by immediate conveyance of the estate, by virtue of the statute of Uses. But the law will not suffer contingent remainders to waver about, and to be so uncertain that no man knows where to find them, which they must be, if this doctrine of relation should prevail. Now suppose the surrenderee had made a grant of his estate to another person, before he had accepted of the surrender, and the grantee had entered, Would this subsequent assent have divested this estate, and made the grant of no effect? If it would, then here is a plain way found out for any man to avoid his own acts, and to defeat purchasors. Therefore it is with great reason that the law provides that no person shall take a surrender but he who has the immediate reversion, and that the estate shall still remain in the surrenderor until all acts are done which are to complete the conveyance.

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Inst. 675. 3. Co. 30.

(a) Fitz. Abr. title, "Debt," 149. Year Book 9. *Edw.* 3. pl. 7.; but see pl. 48. Rastal's Entries, 136. *contra.*

(b) Keilway, 194. Dyer, 358.

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THOSE WHO ARGUED *against the judgment* held, that the estate passed immediately without the assent of the surrenderor, and that even in conveyances at the common law, it is divested out of the person, and put in him to whom such conveyance is made without his actual assent. It is true, in exchanges the freehold does not pass without *entry*, nor a grant of a reversion without an *attornment* (*a*), but that stands upon different reasons from this case at the bar; for in exchanges the law requires the mutual acts of the parties exchanging, and in the other there must be the con-

* [300] sent of a third person. * But in surrenders the assent of the surrenderee is not required, for the estate must be in him immediately upon the execution of the deed, if he do not shew some dissent to it (*b*). If a man should plead *a release*, without saying *ad quam quidem relaxationem* the defendant *agreavit*, yet this plea is good, because the estate passes to him upon the execution of the deed (*c*). It may be a question, whether the actual assent must be at the very time that the surrender was made; for if it should be afterwards, it is well enough, and the estate remains in the surrenderee till disagreement. Presumption stands on this side, for it shall never be intended that he did not give his assent, but on the contrary, because it is for his benefit not to refuse an estate.

10. Mod. 165. 423. 12. Med. 444. 1. Peer. Wms. 264. 348. 3. Peer. Wms. 800.

Therefore where a *feme sole* had a lease and married, and the husband and wife surrendered it to another in consideration of a new lease to be granted to the wife and her sons, &c. this estate vested immediately in her, though a *feme covert* (*d*), and that without the assent of her husband, for the law intends it to be her estate till he dissent: it is true, in that case his assent was held necessary, because the first lease could not be divested out of him without his own consent. So a feoffment to three, and livery made to one, the freehold is in all till disagreement (*e*). So if a bond were given to stranger for my use, and I should die before I had agreed to it, my executors are entitled to an action of debt, and will recover. A *feme covert* and another were joint-tenants for life; she and her husband made a lease for years of her moiety, reserving a rent, during her life, and the life of her partner; then the wife died: this was held to be a good lease against the surviving joint-tenant till disagreement (*f*); which shews that the agreement of the parties is not so much requisite to perfect a conveyance of this nature, as a disagreement is to make it void. And this may serve as an answer to the second point, which was not much insisted on, That men's titles would be uncertain and precarious, if after the assent of the surrenderee the estate should pass by relation, at the very time that the deed was executed, and that it was not known where the

(*a*) See 4. & 5. *Ann.* c. 16. and 11. *Geo.* 2. c. 19. Ante, page 36. *notis.*

(*b*) See 2. Salk. 618. Sh. Touch. 301.

(*c*) See Goodtitle *v.* Welford, Dougl. 139. to 141. that a release or surrender executed by an interested party is good, though the releasee or surrenderee refuse to accept it.

(*d*) Hob. 203.

(*e*) 2. Leon. 224.

(*f*) 1. Roll. Rep. 401. 441. Cro. Jac. 417. 3. Bulst. 272. Hob. 204. 1. Roll. Abr. 592. 3. Bac. Abr. "Leases," 308.

freehold

freehold was in the mean time, for if he had agreed to it immediately, it had been altogether as private. Then as to the pleadings, it is true, that generally when a surrender is pleaded, it is said, *ad quam quidem sursum redditionem* the party *adtunc et ibidem agreavit*, which implies that the surrenderee was then present; and in such case he ought to agree or refuse. *[301] Besides, those actions to which an agreement is thus pleaded, were generally brought in disaffirmance of surrenders, and to support the leases; upon which the plaintiffs declared, and then the proper and most effectual bar was to shew a surrender and express agreement before the action brought. It might have been insufficient pleading not to shew an acceptance of the surrenderee, but it is not substance; for if issue should be taken, whether a surrender or not, and a verdict for the plaintiff, that defect of setting forth an acceptance is aided by the statute of Jeofails (*a*). In this case there is not only the word "surrender" but "grant and release," which may be pleaded without any consent to it; and *a grant* by operation of law turns to *a surrender*, because a man cannot have two estates of equal dignity in the law at the same time (*b*). Neither can it be said, that there remained any estate in *Simon Leach* after this surrender executed; for it is an absurd thing to imagine, that when he had done what was in his power to complete a conveyance, and to divest himself of an estate, yet it should continue in him. Therefore the remainder in contingency to the lessor of the plaintiff was destroyed by this surrender of the estate to him in reversion, for by that means when it did afterwards happen, there was no particular estate to support it.

But notwithstanding the judgment was affirmed. And afterwards, in the fourth year of *William and Mary*, upon a writ of error brought in the *House of Lords*, it was reversed.

(*a*) Cro. Eliz. 249. 488.
(*b*) 2. Vent. 206. 1. Roll. Abr. 497. 3. Bac. Abr. "Leases," 457.

Thompson *against* Leach. Case 194.

A person *non compos*, being tenant for life, with remainder to his first and other sons, remainder over, makes a surrender to him in reversion, before the birth of a son, with intent to destroy the contingent remainder, and dies, leaving issue a son.—The surrender is void *ab initio*; and the son, though he claim as *remainder-man*, and not as *heir*, may take advantage of it.—3. Com. Dig. 48. 4. Co. 123. Carth. 211. 2. Salk. 427. Comyns, 45. 12. Mod. 174. 3. Bac. Abr. 87, 88. 1. Ld. Ray. 313. Carth. 211. 2. Salk. 427. 4. Bac. Abr. 315. 3. Burr. 1798.

THIS point having received a legal determination, the same plaintiff brought another action of *trespass* and *ejectment* against the same defendant; and at a trial at THE BAR in *Easter Term* in the ninth year of *William the Third* another special verdict was found, upon which the case more at large was thus:

Nicholas Leach, being seised in fee of the lands in question, made his will in these words:

"IN THE NAME OF GOD, AMEN, &c. I devise my manors "of *Bulkworth*, *Whitebear*, and *Vadacot*, in *Devonshire*, and

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" *Cresby Goat* and *Cresby Grange* in *Northallerton*, in *Yorkshire*, " to the heirs males of my body begotten; and for want of such " issue male, I devise the same to my brother *Simon Leach* for life, " and after his decease * to the first son of the body of the said " *Simon Leach* my brother lawfully to be begotten, and to the " heirs males of the body of such first son lawfully to be begotten, " with like remainder in tail male to the second, third, fourth, " &c. sons; and for default of such issue, to *Sir Simon Leach*, my " kinsman, being son and heir of *Simon Leach*, of *Cadley*, in the " county of *Devon*, esq. deceased, and to the heirs males of his " body lawfully to be begotten; and for default of such issue, to the " right heirs of me the said *Nicholas Leach* for ever." They find that *Nicholas Leach* died without issue; that *Simon Leach* his brother and heir, with remainder over in contingency as aforesaid, entered, and afterwards married *Anne*, the daughter of *Unton Croke*, and that after the said marriage, *viz.* 20 *August*, in the twenty-fifth year of *Charles the Second*, he executed a deed purporting a surrender of the said lands and tenements to *Sir Simon Leach* in manner following: " TO ALL CHRISTIAN PEOPLE, " &c. I *Simon Leach*, of *Elsfield*, in the county of *Oxon*, esq. " send greeting: Know ye that I the said *Simon Leach*, for divers " good causes and valuable considerations me hereunto moving, " have granted, *surrendered*, remised, released, and for ever quit " claimed, and confirmed, and by these presents do grant, surrender, remise, release, and for ever quit claim, and confirm, to " *Sir Simon Leach*, of *Cadley*, in the county of *Devon*, knight of " the *Bath*, and his heirs and assigns for ever, all and every the " manors, &c. to have and to hold the same to the said *Sir* " *Simon Leach* for ever." They find that *Simon Leach*, brother of the testator, was not *compos mentis* at the time of the sealing and delivery of the said surrender; that on the 10th day of *November*, in the twenty-fifth year of *Charles the Second* (which was two months after this surrender made), the said *Simon Leach* had issue of his body *Charles Leach*, who is his son and heir; and that he, after the death of his father, entered, and made a lease to *Thompson*, by virtue whereof he was possessed until the defendant, *Sir Simon Leach*, entered upon him, &c.

Two months before a son was born.

Two questions were made upon this special verdict.

FIRST, Whether this surrender by a person *non compos mentis* was void *ab initio*, and so could pass no estate to the surrenderee? for if so, then though the ideot himself is estopped by his own act, yet that can be no bar to him in the remainder, because the act being void, the estate in law still remains in him.

SECONDLY, If it be not void in itself, then whether it is voidable after the death of the party by *Charles Leach*? he claiming virtue of a collateral remainder, and not as heir at law to devisor.

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* As to THE FIRST POINT it was argued, that the cases of lunatics and infants go hand in hand, and that the same reasons govern both; that the law is clear that a surrender made by an infant is void; therefore a surrender made by a person *non compos mentis* is also void: the reason is, because they know not how to govern themselves; and as FLETA (*a*) saith, *semper judicabuntur infra ætatem*. If he make any conveyance of his land, the law has provided a remedial writ even for himself to avoid his own alienation (*b*). His feoffments are void, and if warranties are annexed, those are also void (*c*); if he grant a rent charge out of his land, that is likewise void (*d*); and if the grantee should distrain for this rent after the death of the grantor, his heir shall have an action of trespass against him (*e*); and therefore, by parity of reason, this surrender must be void. In *Fitzherbert* (*f*) there is a case to this purpose, *viz*. An assize was brought against the tenant, supposing that he had no right of entry, unless under a disseisor by whom the brother of the demandant was disseised. The tenant pleaded, that the supposed disseisor was the father of the demandant, whose heir he then was, and that his said father made a feoffment of the land to the tenant with warranty, and demanded judgment, &c.; the demandant replied, that his father at that time was *non compos mentis*; and the tenant was compelled to rejoin, and take issue upon the insanity; which shews that if he was *non compos* he could not have made such a feoffment. So if he make a feoffment in fee and afterwards take back an estate for life, the *non compos* shall be remitted to his ancient title (*g*); which shews likewise that such feoffment was void, for the *remitter* supposes a former right. It is incongruous to say, that acts done by persons of no discretion shall be good and valid in the law; such are infants and lunaticks; and it stands with great reason that what they do should be void, especially when it goes to the destruction of their estates (*h*). Therefore it is held, that if a person *non compos* release his right, it shall not bar the king in his life time, but he shall seize the land; and if he die, his heir may bring the writ *dum non fuit compos mentis*, and may enter (*i*). It is for this reason that a release made by an infant executor is no bar, because it works in destruction of his interest; the reason is the same where a person *non compos* makes a feoffment, for that likewise destroys his estate (*k*). * So likewise an infant can neither surrender a future interest by his acceptance of a new lease, nor make an absolute surrender of a term of which he is possessed, for such a surrender by deed is void (*l*). It is agreed, that if a man *non compos* make a feoffment by letter of attorney it is merely void (*m*), because

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2. Vern. 224.

(*a*) Fleta, lib. 1. c. 11. num 10.
(*b*) Fitz. N. B. 202. a. The Register, 238. b.
(*c*) Year Book 39. *Hen.* 6. pl. 42.
(*d*) Bracton, fol. 12. n. 5. and fo. 100. 120. Britton, cap. 34. fo 88.
(*e*) Perkins, 5. pl. 21.
(*f*) Fitz. Abr. "Grantee," pl. 80.
(*g*) Fitzg. Abr. "Remitter," pl. 23.
(*h*) 3. Com. Dig. "Enfant."
(*i*) Fitz N. B. 466.
(*k*) Russel's Case, 5. Co. 27. See also 34. Ass. pl. 10.
(*l*) Cro. Car. 502.
(*m*) 4. Co. 125. Carth. 436. 2. Leon. 218.

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cause it is not delivered to the feoffee by the hands of the feoffor; but it is said, that if it be delivered by him in person, then it is only voidable at any time by action or entry (*a*): and of this opinion was SIR HENRY FINCH in his Discourse of the Law (*b*), who in the margin of his book quotes several authorities in the Year Books to justify this opinion; and amongst the rest he cites SIR ANTHONY FITZHERBERT's *Natura Brevium* (*c*), who, taking notice of the old authorities, seems to reject their reasons who affirm that a person *non compos* shall not avoid his own act when he recovers his memory, because he cannot then tell what he did when he was in his former condition (*d*). But certainly when he recovers his judgment, he is then of ability to consider what was done during his insanity, and to avoid such acts by shewing that his indisposition came by the visitation of God, by which he was disabled for a time to do any reasonable thing whatsoever; and this may be as well done as to plead *duress* from men, which the law allows to make compulsory acts void. My LORD COKE in *Beverly's Case* (*e*), taking notice of the great reason of the civil law in cases of this nature, which makes all acts done by *ideots* void without their *curators'* concurrence, and that it was objected as a defect in the common law, that *tutors* were not assigned to such persons; he answers, that our law has given the custody both of them and their lands to the king, which is directly contrary to his own opinion in his Second Institute (*f*), where paraphrasing upon the fourth chapter of MAGNA CHARTA, which prohibits *waste* in the land of wards, from thence he infers that at that time the king had no prerogative to entitle him to the lands of ideots, for if he had, that act would have as well provided against waste in their lands as in those of wards: he farther adds, that the guardianship of ideots did belong to the lords according to the course of the common law. Be it how it will, it is clear, by all the Books, that both by the common and civil law their acts are void; and my LORD COKE esteemed it as a very unreasonable thing that they should not be avoided even during the life of the party himself; but it was never yet de-
[305] nied, that they may be avoided after his death by his * heir or executor; and by parity of reason the law will prevent strangers from being prejudiced by such acts. There is an objection, that some acts done by ideots are unavoidable, as fines levied by them, &c. It is true, such are not to be avoided, not because they are good in themselves, but the reason is, because they are upon record, against which the law will not suffer any averment to be made, presuming that the Courts and Judges in WESTMINSTER HALL would not admit an ideot or infant to levy a fine. This being therefore a void surrender by a person *non compos* the estate is still in the surrenderor, and so the contingent remainder upon his death is well attached in *Charles Leach*, the lessor of the plaintiff. But supposing it is not void, yet there will be *scintilla juris* left in *Simon*

1. Vern. 155. 262. 323. 2. Vern. 342. 414. 3. Peer. Wms. 130. Stra. 915. 1104. 1208.

Ld. Ray. 456. Stra. 735.

(*a*) Co. Lit. 247.
(*b*) Finch's Law, 102.
(*c*) F. N. B. 202.
(*d*) 2. Leon. 218. 1. Ld. Ray. 313.
(*e*) 4. Co. 123.
(*f*) 2. Inst. 14.

Leach

Leach to support the contingency; and to prove this, the case of *Lloyd v. Brookin (a)* was relied on, which was this, viz. *Thomas Bradshaw* was tenant for life, the remainder in tail to his first son, &c. the remainder to *Paul* for life, the remainder to his first, second, and third sons in tail; *Thomas* accepted a fine from *Paul*, who had then a son born; then he made a feoffment, and afterwards *Paul* had another son born; his eldest son died without issue; and it was adjudged that the contingent remainder to his second son was not destroyed by this feoffment, because it was preserved by the *right of entry*, which his elder brother had at the time it was made.

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10. Mod. 45. 124. 362. 2. Vern. 243. 368. Cases T. T. 238. 2. Stra. 1086. 1. Ld. Ray. 314. 316. 2. Ld. Ray. 779. 855.

SECONDLY, If this surrender is only voidable, then whether *Charles Leach*, claiming by a collateral title, can avoid it? It was argued that he may; for it would be absurd that he should have a right to the remainder, and yet have no remedy to recover it.

My LORD COKE in *Beverly's Case (b)* tells us that there are four sorts of privities. *First*, In blood, as heir. *Secondly*, In representation, as executor. *Thirdly*, In estate, as donee in tail, the reversion or remainder in fee. *Fourthly*, In tenure, as lord by escheat. He affirms, that the two first may shew the disability of their ancestor and testator, and avoid their grants. It is true, in the third article he is of opinion that privies in estate shall not avoid the acts of their ancestors, and he puts the case of a donee in tail making a feoffment in fee *within age*, and dying without issue, the donor shall not enter, because no right * accrued to him by the death of the donee, there being only a privity of estate between them. But this opinion is denied to be law by JUSTICE DODDERIDGE in his argument of the case between *Jackson v. Darcy (c)*, who said that the donor might enter, because otherwise he would be without remedy, for he could not maintain a *formedon*, because the feoffment made by the infant was no discontinuance. Besides, it is not possible there should be any privity in blood between the donee in tail and the reversioner in fee, so that article must be intended where they are strangers in blood and privies in estate, which does not at all concern the case in question, because *William Leach* is privy in blood to his father, who made the surrender; and my LORD COKE tells us in the first article of his distinction, that such a privy may avoid the acts of his ancestor. It may be objected, that this distinction was not then the judgment of the Court; for it was not material to the point in issue, which was no more than thus, viz. *Snow* gave bond to *Beverly*, and exhibited his bill in the court of requests to be relieved against it, because at the time of the sealing and delivery thereof he was *non compos mentis*. But the like distinction was made in *Whittingham's Case (d)*, many years afterwards, which was thus, viz.

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(a) 1. Mod. 92. 1. Vent. 188. 2. Keb. 881.
(b) 8. Co. 42.
(c) Palm. 254.
(d) 8. Co. 42.

Whittingham,

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Whittingham, being seised of lands held of the queen in soccage, devised the same to *Prudence*, his bastard child, and her heirs: she, during her *infancy*, made a feoffment thereof to another, and died in her nonage without issue; the question then was, Whether that feoffment should prevent the queen of the escheat? and adjudged it should not? In which case it was held, that privies in blood inheritable shall take advantage of the disabilities of their ancestors: as if an infant who is seised in fee make a feoffment and afterwards die, his heir may enter and avoid it. The law is the same in the case of one *non compos mentis*, as in that of an infant, as to the avoiding of the acts of their ancestors; so that *Mr. Leach* being privy in blood according to my LORD COKE's opinion in those cases shall avoid the acts of his father, he being *non compos* at the executing of this surrender. If it should be objected, that this part of the distinction ought to be taken restrictively, and must be tied up to such an heir at law who takes an immediate possession by descent from his ancestor, the answer is, that if this surrender is avoided, *Mr. Leach* will take by immediate descent from his father; for though nothing but a reversion in fee descended to him,
* [307] yet he is a complete heir. * But after all, this distinction made by my LORD COKE is founded upon no manner of authority; it is only his extrajudicial opinion; for there is no reason to be given why privies in estate should not avoid such acts done by their ancestors as well as privies in blood, because the incapacity of the grantor goes to both.

Those who argued *on the other side* held, that the acts of infants and persons *non compos* were not void in themselves, but only voidable. It is true, some deeds made by an infant are void not merely because executed by him, for some are good, and those only are void which are made to his prejudice (*a*). Such also are void which give authority to a third person to do an act (*b*); as if an infant enter into a bond, and give it to a stranger to deliver to the obligee when he shall attain his full age; this is void, because the person derived his authority from an infant, who by reason of his nonage could not give such a power; but if the infant himself had delivered the bond to the obligee, it had been only voidable (*c*). The father of the demandant was an infant when he sold his estate, his son brought the writ *dum fuit infra ætatem* against the alienee, and it was held good (*d*), which would not have been allowed if the grant had been void. All the old authorities prove that the acts of infants and ideots are not void but voidable (*e*). If an infant be bound in an obligation it is not void, for he may agree to it when of age; he cannot plead *non est factum*, and he may refuse to plead his infancy (*f*). If he be entitled to a term for years, and make a surrender by the acceptance of a new lease, it is good if it is for his advantage, either by the lessening of the rent or the increasing of the term; but if he have no benefit by

Fitzg. 275. 10. Mod. 29. 67. 85. 139. 179. 1. Peer. Wms 380. 558. 734. 2 Peer. Wms. 244. 3. Peer. Wms 208.

(*a*) Cro. Car. 502.
(*b*) Perk. sect. 139. March, 141.
(*c*) Litt. sect. 259.
(*d*) Year Book 46. *Edw.* 3. pl. 34.
(*e*) Brook, Abr. "Leases," 50. Moor, 663. 1. Roll. Abr. 729. 3. Bac. Abr. 304
(*f*) Cro. Eliz. 127. 2. Inst. 483.

it,

it, it is voidable only (*a*). So he may purchase lands, because the law intends it for his benefit, and he can receive no damage by such a purchase, for he may either perfect or avoid it at his full age; which shews that such acts are not void *ab initio*, but only voidable as the case shall require (*b*). The statute of 23. *Hen.* 6. c. 10. enacts, "that sheriffs shall take no bonds upon an arrest, but "for the appearance of the party, and to themselves only, and that "a bond otherwise taken *colore officii* shall be *void*;" that is, not in itself, but by pleading the statute; for it is not to be avoided by pleading *non est factum*. * So upon the statute of Additions (*c*), where a man is outlawed without the addition of his condition or place of abode in the original writ, such outlawry shall be void, not of itself, but it may be avoided by a writ of error: in like manner there are many authorities to prove that the acts of a person *non compos* are not void, but voidable. So is the first resolution in *Beverly's Case* (*d*), that a deed or feoffment made by him is to be avoided by any other person, but not by himself. Thus stood the law in the time of *Edward the Third*, for in an assize (*e*) the defendant pleaded that the plaintiff had released to him by deed, who replied, that at the time of making the deed he was *non compos*; the court of common pleas seemed then to be of opinion that the replication was not good; which shews that the deed in itself was not void: it is true, the assize was then adjourned, because that opinion was directly against *the Register*, which is, that the writ of *dum non fuit compos* may be brought by the person himself, notwithstanding his own alienation. But this has since been denied to be law; for in debt upon bond the defendant pleaded that he was *non compos*; and upon a demurrer the plea was over-ruled (*f*). And of this opinion was SIR WILLIAM HERLE, *Chief Justice* of the common pleas in the reign of *Edward the Third* (*g*), which was long before the *Book of Assize*. So the law continued till the reign of *Henry the Sixth* (*h*), viz. that the person himself could not avoid his own feoffment either by entry or action. The writs "*de idiota inquirendo*" and "*dum non fuit compos*" import the same thing, *viz.* that acts done by them are not void; for the first recites that the ideot *alienavit*; and the other, that the lunatic *dimisit terras* (*i*): now if their acts had been void *ab initio*, then they cannot be supposed either to *alien* or *lease their lands*; which shews that such acts are only

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(*a*) Cro. Eliz. 126. Cro. Car. 502.
(*b*) Fitzg. 275. 1. Peer. Wms. 389. 10. Mod. 29. 3. Bac. Abr. "Leases," 304.
(*c*) The 1. *Hen.* 5. c. 5. See 3. Co. 59. a.
(*d*) 3. Co. 123. 2. Roll. Abr. 234.
(*e*) 35. Assize, pl. 10.
(*f*) Stroud *v.* Marshal, Cro. Eliz. 398. See also Fitz. N. B. 202. and Mr. Hargrave's note (2), Co. Lit. 247. a. 2. Bl. Com. 291.
(*g*) See the Year Book 5. *Edw.* 3. pl. 70.
(*h*) See the Year Book 35. *Hen.* 6. pl. 42.
(*i*) "*Dimisit*" is there intended where the estate is conveyed by *livery* or for life; and "*alienavit*" is a conveyance by feoffment, 17. *Edw.* 2. pl. Staund. de Prærogativa Regis, 34.— *Note to the* FORMER EDITIONS.

voidable.

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voidable. And as a farther argument to enforce this, the ſtatute *de Prærogativa Regis* was mentioned, which gives the cuſtody of the ideots lands to the king during their lives, provided that afterwards it be given to their right heirs, *ita quòd nullatenus per eoſdem fatuos alienetur*. Now to what purpoſe were theſe words added if ſuch an alienation was void in itſelf? Beſides, the caſes of *ideots* (mentioned on the other ſide) and *lunatics* are not parallel; for an ideot has a different incapacity from one *non compos*; it is perpetual in an ideot; and for that reaſon the law gives the king an intereſt in him. * But a perſon *non compos* may recover his ſenſes; he may purchaſe lands; may grant a rent charge out of his eſtate; and ſhall not plead his inſanity to defeat his own act (*a*). If therefore this ſurrender was not void at the time of the execution thereof, but voidable only during the life of the ſurrenderor by office found, then the queſtion cannot properly be, whether the leſſor of the plaintiff ſhall avoid it, for that would be to reveſt the eſtate in ſomebody; but the ſurrender was good, and the eſtate for life was utterly determined, ſo that nothing being left to ſupport the contingent remainders, thoſe are alſo deſtroyed. And to prove this *Chudleigh's Caſe* (*b*) was relied on; which was, *Sir R. C.* was ſeiſed in fee of the manor of *Heſcot* in *Devon*, and having iſſue *Chriſtopher*, and three other ſons, made a feoffment to the uſe of himſelf and his heirs, on the body of *Mary*, then the wife of *Mr. Carew*, to be begotten; and for default of ſuch iſſue, then to the uſe of his laſt will, &c. for ten years; and after the expiration of that term, then to his feoffees and their heirs, during the life of *Chriſtopher*; remainder to the iſſue male of *Chriſtopher* in tail, with like remainder to his other ſons, remainder to his own right heirs: he died without iſſue by *Mrs. Carew*; but before *Chriſtopher* had any ſon born, the ſaid feoffees made a feoffment of the land in fee, without any conſideration; afterwards *Chriſtopher* had iſſue two ſons. Now the uſes limited by the feoffment of *Sir R. C.* being only contingent to the ſons of *Chriſtopher*, and they not being born when the ſecond feoffment was made to their father, the queſtion now was, Whether they ſhall be deſtroyed by that feoffment, before the ſons had a being in nature, or whether they ſhall ariſe out of the eſtate of the feoffees after their births? And it was adjudged in the exchequer chamber, that the laſt feoffment had diveſted all the precedent eſtates, and likewiſe the uſes whilſt they were contingent, and before they had an exiſtence; and that if the eſtate for life which *Chriſtopher* had in thoſe lands had been determined by his death before the birth of any ſon, the future remainder had been void, becauſe it did not veſt whilſt the particular eſtate had a being, or *eo inſtanti* that it determined. So in this caſe *Mr. Leach* cannot have any future right of entry, for he was not born when the ſurrender was made, ſo that the contingency is for ever gone. Suppoſe a feoffment in fee, to the uſe of himſelf and his wife, and to the heirs

See 1. Hawk. P. C. 2. notis.

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4. Mod. 284.

(*a*) Co. Lit. 2. b. Fitz. Abr. "Iſſue," 53. (*b*) 1. Co. 120. S. C. Poph. 70.

of

of the furvivor; * the hufband afterwards makes another feoffment of the fame lands, and dies, and the wife enters, the fee fhall not veft in her by this entry, for fhe had no right; the hufband has deftroyed the contingent ufe by the laft feoffment, fo that it could not accrue to her at the time of his death (a). Nay though the particular eftate in fome cafes may revive, yet if the contingency be once deftroyed, it fhall never arife again. As where the teftator, being feifed in fee of houfes, devifed the inheritance thereof to fuch fon his wife fhould have (after her life), if fhe baptized him by his chriftian and firname; and if fuch fon die before he attain the age of twenty-one years, then to the right heirs of the devifor; he died without iffue; the widow married again; then the brother and heir of the teftator, before the birth of any fon, conveyed the houfes thus, *viz.* to the hufband and wife, and to their heirs, and levied a fine to thofe ufes; afterwards fhe had a fon baptized by the teftator's chriftian and firname; then the hufband and wife fold the houfes to one *Wefton* and his heirs, and levied a fine to thofe ufes; it was adjudged (b), that by the conveyance of the reverfion by the brother and heir of the teftator to the hufband and wife, before the birth of the fon, her eftate for life was merged; and though by reafon of her coverture fhe might waive the jointenancy, and reaffume the eftate for life, yet that being once merged, the contingent remainders are all deftroyed (c).

THOMPSON against LEACH.

10. Mod. 3'2. 11. Mod. 1.2. 1. Ld. Ray. 521.

1. Vern. 443. 2. Vern. 243. Prec. Ch. 338. 435. Gilb. E. R. 20. 34. 12. Mod. 444. 1. Ld. Ray. 314.

CURIA. The grants of infants, and of perfons *non compos*, are parallel both in law and reafon; and there are exprefs authorities that a furrender made by an infant is void (d); therefore this furrender by a perfon *non compos* is likewife void (e).* If an infant grant a rent charge out of his eftate, it is not voidable, but *ipfo facto* void; for if the grantee fhould diftrain for the rent, the infant may have an action of trefpafs againft him (f). In all the cafes which have been cited, where it is held that the deeds of infants are not void but voidable, the meaning is, that *non eft factum* cannot be pleaded, becaufe they have the form, though not the operations of deeds, and therefore are not void upon that account, without fhewing fome fpecial matter to make them of no efficacy.

(a) Biggot *v.* Smith, Cro. Car. 102. —See 1. Ld. Ray. 315. Fearn Con. Rem. 3. edit. 216. 4 Bac. Abr. 314.

(b) Purefoy *v.* Rogers, 2. Saund. 380. 2. Lev. 39. 3. Keb. 11.—See 4. Mod. 284. Show. C. P. 151. 4. Bac. Abr. 315.

(c) Wigg *v.* Villiers, 2. Roll. Abr. 796.—But fee 1. Ld. Ray. 316. 2. Burr. 1807.

(d) See 7. *Ann.* c. 19. and 29. *Geo.* 2. c. 31.

(e) Lloyd *v.* Gregory, Cro. Car. 502. Jones, 405. 3. Bac. Abr. 136, 137.

(f) In the cafe of Hudfon *v.* Jones, Trinity Term 6. *Ann.* B. R. it is faid to have been held, that if an infant grant a rent charge out of his land it is not abfolutely *void*, but only *voidable* by him when he comes of age; for that if the grantee fhould then diftrain for the rent, though the other may bring an action of *trefpafs*, yet he cannot plead "*non concessit*; for the deed is only voidable by the fhewing of his infancy, and not void, becaufe it was delivered with his own hand, 3. Bac. Abr. 139.—And fee 5. Co. 115. 2. Inft. 483. Cro. Eliz. 127. Moor, pl. 132. Poph. 138.

Therefore

THOMPSON *against* WYBANK.

* Therefore if an infant make a letter of attorney, though it be void in itself, yet it shall not be avoided by pleading *non est factum*, but by shewing his infancy. Some have endeavoured to distinguish between a deed which gives only authority to do a thing, and such which conveys an interest by the delivery of the deed itself, that the first is void, and the other voidable. But the reason is the same to make them both void; only where a feoffment is made by an infant, it is voidable because of the solemnity of the conveyance. Now if *Simon Leach* had made *a feoffment* in fee, there had still remained in him such a right which would have supported this remainder in contingency (*a*). This surrender is therefore void, and all persons may take advantage of it.*

Shower's Cases in Parl. 150.

Afterwards a writ of error was brought to reverse this judgment in the house of lords, but it was affirmed.

(*a*) *Sed quære.*—See Palm. Rep. 254. 1. Bl. Rep. 578. 4. Burr. 1807.

Case 195.

Hall *against* Wybank.

Michaelmas Term, 1. Will. & Mary. Roll 671.

If a debtor be beyond sea at the time the cause of action arises, the creditor may sue after his return within the times limited by 21. *Jac.* 1. c. 16. and the 4. *Ann.* c 16.

S.C. Carth. 136. S. C. 1. Show. 98. S. C. 2. Salk. 420. 1. Lev. 143. 8. Mod. 26. Cro. Car. 246. 334. 2. Vern. 694. 1. Wils. 134. 4. Viner Abr. 236. 5. Com. Dig. "Temps" (G. 16.). 3. Bac. Abr. 514. Dougl. 652.

THE STATUTE 21. *Jac.* 1. c. 16. of Limitations is, "that if "any person be entitled to an action, and shall be an infant, "*feme covert*, imprisoned, or beyond sea, that then he shall bring "the action when he is at full age, discovert, of sane memory, at "large, or returned from beyond sea."

The plaintiff brought an *indebitatus assumpsit*; to which the defendant pleaded *non assumpsit infra sex annos*; the plaintiff replied, that the defendant was all that time beyond sea, so that he could not prosecute any writ against him, &c. And upon a demurrer,

TREMAINE, *Serjeant*, argued that the plaintiff was not barred by the statute which was made to prevent suits, by limiting personal actions to be brought within a certain time; and it cannot be extended in favour of the defendant, who was a debtor and beyond sea, because it is uncertain whether he will return or not; and therefore there is no occasion to begin a suit till his return. It is true, the plaintiff may file *an original*, and outlaw the defendant, and so seize his estate, but no man is compelled by law to do an act which is fruitless when it is done, and such this would be; for if the plaintiff should file *an original*, it is probable the defendant may never return, and then if the debt were a thousand pounds or upwards, he would be at a great expence to no purpose, or if the party should return, he may reverse it by error (*a*). * It is a new way invented for the payment of debts; for if the debtors go beyond sea and stay there six years, their debts would by

(*a*) See Lutw. 260. 1. Sid. 53. Salk. 421. Stra. 550. 734. 2. Ld. Ray. 1441. 3. Burr. 1423.

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1. Ld. Ray. 283. 2. Vern. 541. 694. Stra. 836. 10. Mod. 93. 111. 242. 281. 343. 356. 410.

this means be all paid. The words of the ſtatute do not extend to this caſe, for THE PROVISO is, "that if the plaintiff be beyond ſea "when the cauſe of action doth accrue, that then he ſhall have li-"berty to continue it at his return;" yet it is within the equity of law for him to bring his action when the defendant returns, who cannot be ſued till then *(a)*. That ſtatutes have been expounded according to equity, is not now a new poſition; for conſtructions have been made according to the ſenſe and meaning, and not according to the letter of many ſtatutes (*b*). As the *ſtatute of Weſtminſter the Second*, c. 11. which gives an action of debt againſt a gaoler for an eſcape, and that *per breve*, yet by the equity thereof it has been adjudged, that a *bill of debt* will lie. For the ſtatute of 1. *Rich.* 2. c. 12. gives the like action againſt the warden of the Fleet, for the eſcape of a priſoner in execution, which by conſtruction has been adjudged to extend to all gaolers and ſheriffs *(c)*. If this ſtatute ſhould not be expounded according to equity, then if the plaintiff himſelf ſhould be beyond ſea ſix years after the cauſe of action, and die there, his executor or adminiſtrator cannot ſue for a debt.

CURIA. This caſe is out of the equity of the ſtatute, which provides a remedy when the plaintiff is beyond ſea, but not when the defendant is there *(d)*; it was never intended to make any proviſion for him, ſince the plaintiff might file an *original*, and ſue him to the outlawry.

But DOLBEN, *Juſtice*, making ſome doubt, *adjournatur (e)*.

(*a*) Swain *v.* Stephens, Cro. Car. 246. 333.—And ſee Perry *v.* Jackſon, 4. Term Rep. 516. that if one plaintiff be abroad, and others in England, the action muſt be brought within ſix years after the cauſe of action ariſes.

(*b*) 2. Roll. Rep. 318.

(*c*) 1. Saund. 38.

(*d*) But now by 4. & 5. *Ann.* c. 16. "If any perſon againſt whom an action "lies for ſeaman's wages, treſpaſs, deti-"nue, trover, or other action mentioned "in 21. *Jac.* 1. c. 16. be beyond ſea "at the time ſuch action accrued, the "plaintiff ſhall be at liberty to bring his "action againſt him within the ſame "time after his return as is limited for "ſuch action by 21. *Jac.* 1. c. 16."

(*e*) In S. C. Carth. 137. S. C. 1. Show. 99. it is ſaid, that judgment was given for the defendant.

MICHAELMAS

MICHAELMAS TERM,

The Second of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*
Sir William Dolben, *Knt.*
Sir William Gregory, *Knt.* } *Justices.*
Sir Giles Eyres, *Knt.*
Sir George Treby, *Knt. Attorney General.*
Sir John Somers, *Knt. Solicitor General.*

Hobbs, *Qui Tam*, &c. *against* Young.
Hilary Term, 1 & 2 Will. and Mary, Roll 129.

Case 196.

If a man employ workmen in his own house, he not having served as apprentice to the trade, it is an exercising of the trade; and therefore restrained by the statute of 5. *Eliz.* c. 4.

S. C. 1. Show. 241. 266.

AN INFORMATION was brought upon the ftatute of the 5. *Eliz.* c. 4. for exercifing the trade of *a clothworker*, not being an apprentice to the fame, and likewife for fetting people to work at that trade, not having ferved an apprenticefhip to it.

Upon *not guilty* pleaded, the jury found a fpecial verdict to this purpofe: That the defendant was a merchant, who exported cloth to *Turkey*, and that for the fpace of a month he had employed men in his houfe in the trade of a *clothworker*; which men had been educated in the faid myftery for the fpace of feven years; that he provided materials for them, and paid them weekly wages; but that he himfelf had not been an apprentice to the faid trade; and that it was a trade at the time of the making of the ftatute, &c. (*a*).

S. C. 2. Salk. 610. S. C. Comb. 179. S. C. Carth. 162. S. C. Holt, 66. 8. Co. 129. Noy, 5. 1. Saund. 311. 2. Salk. 613. 10. Mod. 105. 148. 12. Mod. 311. 1. Ld. Ray. 767. 2. Ld. Ray. 1188. 1248. 1. Burr. 2. 4. Burr. 2449. 2. Wilf. 168. 3. Bac. Abr. 553.

(*a*) See ante p. 152. where it is faid, the omitting to aver that it was *a trade* at the making of the act, feems to be a material objection; and in Rex *v.* Green, 2. Show. 210. an indictment was quafhed for this reafon; the Court however agreed and declared that this exception fhould never be allowed for the future. But fee Rex *v.* Slaughter, 1. Ld. Ray. 515. 1. Bl. Com. 428. Rex *v.* Lifter, 2. Stra. 788. Rex *v.* Munro, 1. Bar. K. B. 277.

The

Hobbs, *Qui Tam, &c.* against Young.

The question was, Whether this ſhould be accounted exerciſing a trade within the meaning of the ſtatute, or no?

Thoſe who argued *for the plaintiff* ſaid, that true it is, any man might exerciſe what trade he thought fit at the common law, but this confuſion had been remedied by ſeveral ſtatutes. The firſt is the ſtatute of 37. *Edw.* 3. c. 5. that merchants ſhall not engroſs goods to enhance the prices, nor uſe but one ſort of merchandiſe. Afterwards by the 38. *Edw.* 3. c. 2. the former ſtatute was repealed, and liberty given to merchants only to uſe what merchan-
*[314] diſe they would. * Then comes the ſtatute of *Queen Elizabeth*, and the remedies intended by that and the former acts were, FIRST, The reſtraining of ignorant pretenders to trade.—SECONDLY, To make a diſtinction of trades, and to fit them to different ranks of men.—THIRDLY, To encourage thoſe who had undergone an apprenticeſhip, by prohibiting others to exerciſe their trades. The words of this latter ſtatute are, "That no perſon, other than ſuch "who do now lawfully uſe or exerciſe any art or myſtery, or manual occupation, ſhall exerciſe any craft, myſtery, or manual "occupation, now uſed within this realm, except he ſhall be "brought up therein ſeven years at the leaſt, as an apprentice, "nor ſet any perſon on work in ſuch myſtery, &c. being not a "workman at the time of making the ſtatute, except he ſhall have "been an apprentice, as aforeſaid, or elſe having ſerved as an apprentice, ſhall become a journeyman, or hired by the year, "under the pain of forty ſhillings *per* month." It is plain by this law, that he who cannot uſe a myſtery himſelf, is prohibited to employ other men in that trade; for if this ſhould be allowed, then the care which has been taken to keep up myſteries, by erecting guilds and fraternities, would ſignify little. In the caſe of *Moſtyn v. Nightingale*, 3. *Jac.* 2. upon this ſtatute, it was proved that the defendant employed none but *pinmakers* in that trade; yet not having ſerved an apprenticeſhip himſelf, the plaintiff had a verdict.

It was inſiſted on *the defendant's behalf*, that as this offence is laid in the information, it is not within the firſt branch of that clauſe in the ſtatute; for no man will ſay, that when the defendant ſets other perſons to work, ſuch employing them is an exerciſing the trade within the firſt branch of that paragraph. Neither is it within the ſecond branch, the meaning whereof is, that no perſon ſhall be employed but ſuch as have ſerved an apprenticeſhip, &c. Now the perſon who ſets ſuch people to work is not puniſhable by this law, but the men themſelves who do work not being qualified; and thoſe are not puniſhable in this caſe, becauſe the verdict has found that they were apprentices, and had ſerved ſeven years to the trade. It is not material to ſay, that the men thus employed by the defendant in this trade are his ſervants, and that by their working the
[315] *Company of Clothworkers* may be damnified, for the * act is not reſtrained to particular Companies, but takes care in general that the work ſhall be well done. No man will ſay that a merchant is within this ſtatute; for the preamble itſelf ſhews it is for the reformation

reformation of trades and manual occupations; so that as a merchant is not within the letter, neither is he within the meaning of the law, because he is of a superior order and degree of men. The chief design therefore of this law being that unskilful men should not employ themselves in trades, and the defendant having set none to work but such who were of that trade, and artists in it, the meaning of the act is fully pursued, and no injury is done to any person. Besides, it does not appear by this verdict that any thing was done by the defendant but in his own family, and probably it might be for their use, and then it is no offence. But if it be a crime in the defendant, then all the petty chapmen in *England* are within this statute, for they use several goods belonging to particular trades, and few of them have been apprentices to any trade.

HOBBS, *Qui Tam*, &c. *against* YOUNG.

It was said by some of the Counsel who now argued this case, that they had formerly attended my LORD HALE upon the like matter, whose opinion was, that such *petty chapmen* were not within the statute, but that they were warranted by *the custom* of those places where they lived.

See the statutes 9. & 10. *Will.* 3. c 27. 2. & 3. *Anne* c. 4. and the 25. *Geo.* 3. c. 78.

Afterwards in *Trinity Term* in the third year of *William and Mary*, JUDGMENT was given for the plaintiff by the opinion of three Judges.

The questions are two:

FIRST, Whether this is a *setting up* of a trade within the express words of the statute?

SECONDLY, Whether the working of these cloths in the defendant's house will be *using* a trade? &c.

It cannot be denied, but that at the common law a man might exercise what trade he would, therefore this statute is penned in the negative, to prevent many inconveniences which happened before the making of this law. Some authorities there are where informations have been brought upon this statute, and the defendants have pleaded the custom of *London* for a man educated in one trade to exercise another; and upon demurrer such pleas have been over-ruled (*a*); but reason in this case is the best authority. * Journeymen who work for hire cannot be within the meaning of this statute, but the defendant by employing such had an influence upon the trade, and so it is found, *viz.* that he provided materials, and paid the workmen, and therefore he, and not the master workman, who is but a journeyman, is the person who did exercise the trade, not being an apprentice; the management was for his profit, the workmen had no more but their wages, and it would be very mischievous if the statute should be otherwise construed. A widow shall not exercise her husband's trade, unless

1. Bl. Com. 354. 427.

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12. Mod. 603.

(*a*) Rex *v.* Bagshaw, Cro. Car. 347.; and see Hawksworth *v.* Hillary, 1. Saund 313.

Hobbs, *Qui Tam, &c. against* Young.

she is enabled by the custom of the place *(a)*, and possibly she might live so long with him as to be very skilful in it *(b)*; but the act being penned in the negative must have a large construction, and therefore a usage against it will not take away its force.

Paying the wages is as much as using the trade himself; it is properly his driving the trade by the hands and labour of his servants: and it seems plain by the statute of 1. *Jac.* 1. c. 22. that this may be done, for that statute enacts, "that no person using the "mystery of tanning leather by himself, or any other person, shall "exercise the craft of a shoemaker, &c." which shews that the trade may be carried on by servants and workmen. A *goldsmith* never makes his own plate; he only provides materials for the workmen; but yet he is a trader within the statute, because he makes profit of the plate. An *inn-keeper* who sells beer, bread, &c. *in his house* is not within this statute, because it is part of his trade to provide such things for his guests; but if he sell any quantities *out of doors*, he is then within the reach of this law *(c)*, which ought to have a very beneficial construction, because it is made to maintain skilful men in trades, which is for the public good of mankind.

Secondly, It is plain, that he who uses one trade cannot exercise another, therefore a *coachmaker* shall not make his own wheels; if he do, it is exercising the trade of *a wheelwright:* and so of the iron, and leather, and the other materials which make up a coach *(d)*. In *Mr. Attorney Noy's Reports* there is a case *(e)* of an information brought upon this statute against the defendant, being *a feltmaker*, for dyeing of his own *hats*; and it was adjudged for him that it is part of his trade; but this is a single authority, and many have been against it since that time. At the assizes in *Cambridge* the like information was tried against *a combmaker*, for exercising the trade of *a horner:* it was insisted, that it was
* [317] part of his trade, for he fitted the *horn* * for his use in making of combs; but there was a verdict for the plaintiff, for it was held to be an exercising of the trade of a horner; and the Counsel for the defendant, who were learned men, acquiesced under that judgment. He who is a servant, who undergoes no hazard, but is to have a certain reward for his labour, does not exercise a trade *(f)*, but it is the master who employs him, who has all the profit, and who in this case sells at the same rate as if he paid the cloth-worker. The statute says, " that none who hath not served as

(a) Noy, 5

(b) See Carth. 163. 1. Show. 242.

(c) 2. Bulst. 187. See Saunderson *v.* Rolls, 4. Burr. 2065. Buscal *v.* Hogg, 3. Wils. 146. Port *v.* Turton, 2. Wils. 169. Mayo *v.* Archer, 1. Stra. 513. Palmer *v.* Vaughan, 1. Term Rep. 572. Newton *v.* Trigg, post. 327. and the cases there cited.

(d) But see French *v.* Adams, 2. Wils. 168. *contra.*

(e) Hunter *v.* Moor, Noy, 133.

(f) An action therefore will not lie on this statute against *a journeyman* for working at a trade in which he has not served *as* an apprentice; for by Lord Mansfield there is a great difference between *setting up* a trade and *working* at it, and the statute only meant to prevent persons from *setting up* or employing persons in trade, for which they are not qualified. Beach, *Qui Tam*, *v.* Turner, 4. Burr. 2449.

Hobbs, *Qui Tam, &c.* *against* Young.

" an apprentice in any mystery, &c. shall use the same, &c." Now he who employs men in his house uses the trade, &c. For suppose a merchant should hire journeymen-shoemakers to work in his house for the Plantations, this can be no other thing than the exercising of the trade of a shoemaker. Private usage is not within the meaning of this law, but if what is done be for profit and gain, and not confined to a particular family, it is an exercising of a trade within the intention of this statute. If the defendant had sold these cloths in *England*, he had been *a draper*; and having exported them, he is a merchant: wherefore for these reasons judgment was given for the plaintiff.

But Dolben, *Justice*, was of another opinion: he said, that no encouragement was ever given to prosecutions upon this statute, and that it would be for the common good if it were repealed, for no greater punishment can be to the seller than to expose goods to sale ill wrought, for by such means he will never sell more. In this case there is no inconvenience to the *Company of Clothworkers*, because that trade is a manual occupation for hire; the master workman is the person who uses the trade, and the defendant has done nothing but what is the proper work of a merchant in his own house, which cannot be a public use of the trade. The intent of the making of this statute was to prevent idleness, and that there might be generally a good manufacture. Now the defendant has well answered both these ends, for he has employed men in the working; and not only so, but such men who were bound apprentices and served seven years in that very trade, such who could work well, and to whom he gave good wages. It is the interest of a merchant that his cloth be well wrought, but the clothworker cares not how it is done so he has his wages; and by this care and industry of the defendant that trade, which was almost lost abroad, is now come into reputation again. 1. Bl. Com. 427.

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* Bradburn *against* Kennerdale.

Case 197.

Michaelmas Term, 4. Jac. 2. Roll 640.

In replevin, if the defendant alledge a seisin in fee in *A.* by whose command he took *damage feasant*, a replication, that the father of *A.* was seised of the said manor and made a lease thereof to *B. C.* and *D.* and that on the death, &c. *D.* entered as *occupant*, and demised the place where to the plaintiff, &c. without traversing that the place where was parcel of the manor at the time of the taking, is bad: but in such pleading the plaintiff need not traverse that *A.* was seised of the place where.—S. C. Carth. 164. S. C. Holt, 530. S. C. 3. Salk. 354. Dyer, 312. Jones, 402. Yelv. 140. Cro. Car. 324. 1. Saund. 207. Ray. 170. 2. Mod. 60. 10. Mod. 205. 257. 265. 297. 302. 11. Mod. 145. 12. Mod. 97. 121. 376. 1. Stra. 117. 191. 299. 2. Stra. 871. 1220. 2. Ld. Ray. 1054. 1140. 5. Com. Dig. 110, 111. Cowp. 575.

ERROR to reverse a judgment in an inferior court at *Chester*, in *replevin*, for the taking of a cow.

The defendant made cognizance as bailiff to *Sir Peter Warburton*, setting forth, that before the taking, &c. *Sir Peter* was seised in fee of the manor of *Arkey*, of which the *locus in quo* was parcel, and for that the cow was there *damage feasant* he took it, &c.

The

BRADBURN *against* KENNERDALE.

The plaintiff in bar to the avowry confesses, that *Sir Peter Warburton* was seised in fee, &c. but that before that time *Sir George Warburton*, his father, was seised of the said manor, and likewise of one messuage in fee, &c. and being so seised made a lease thereof for three lives, *viz.* for the life of *G. H.* the father, and for the lives of his two sons, *George* and *John*, *et alterius eorum diutius viventis*; that one of them was dead; and that the other entered and was seised as *occupant*, and let the land to the plaintiff until, &c. *Et hoc paratus est verificare.*

The defendant demurred to this replication, and had judgment.

The matter now in debate was upon exceptions to *the bar*.

FIRST, For want of a traverse that *Sir Peter Warburton* was seised in fee at the time of the taking, &c.

SECONDLY, For want of a sufficient title alledged in the plaintiff, for that by the statute of Frauds, 29. *Car.* 2. c. 3. all occupancy is now taken away.

It was argued, that the replication was good without a traverse, for where the plaintiff has confessed and avoided, as he has done here, if he had traversed likewise, it would have made his replication double *(a)*. He confesses that *Sir Peter Warburton* was seised in fee of the manor, but afterwards the seisin is expressly alledged to be in *Sir George* the father, and that the place WHERE was parcel thereof, which is a confession and an avoidance. The avowant should have traversed this lease, but the traverse of the plaintiff upon him had made it a worse issue. * Agreeable

* [319] to this case in reason is that which was adjudged in this court in *Michaelmas Term* 10. *Car.* 1. *(b)*. It was in trespass; the defendant pleaded, that the *locus in quo* was the sole freehold of *John Marquis of Winchester*, and justified by his command; the plaintiff replied, that the land was parcel of the manor of *Abbots Anne*, and that *William Marquis of Winchester* was seised in fee, and levied a fine to the use of himself and wife for their lives, the remainder to *Edward Lord Pawlet* for one hundred years if he lived so long, who after the death of the cognizors entered and made a lease to the plaintiff; and, upon a demurrer to this replication, the same exception was then taken as now, *viz.* that the plaintiff did not *confess* and *avoid* the FREEHOLD of *John*; but the plaintiff had judgment; for the bar being at large, and the title in the replication being likewise so too, the plaintiff may claim by a lease for years without answering the freehold.

10. Mod. 10. 88. 11. Mod. 2. 1. Stra. 313. 641. 2. Stra. 933. 1011.

The not concluding with a traverse is but a form, and the Court will proceed according to the right of the cause without such form *(c)*; it is a defect which, after a joinder in demurrer, is ex-

(*a*) Co. Ent. 504. 2. Vent. 212. 4. Bac. Abr. 119.

(*b*) King *v.* Coke, Cro. Car. 384. S. C. Jones, 352.

(*c*) See the statute 27. *Eliz.* c. 5. 1. Leon, 44. 80. Cro. Car. 324. Yelv. 151. 2. Vent. 213. Lutw. 1558. 2. Saund. 50.

presly

preſsly helped by the ſtatute of Jeofails, which enables the Court to amend defects and want of forms other than ſuch for which the part has demurred. BRADBURN *against* KENNERDALE.

The caſe of *Edwards v. Woodden* is in point *(a)*, it was in replevin; the defendant made cognizance as bailiff to *Cotton*, for that the place WHERE, &c. was ſo many acres parcel of a manor, &c.; that *Bing* was ſeiſed thereof in fee, who granted a rent-charge out of it to *Sir Robert Heath* in fee, who ſold it to *Cotton*, *&c.*; the plaintiff in bar to the conuſance replied, and confeſſed that the land was parcel of the manor, &c. and that *Bing* was ſeiſed in fee *prout*, *&c.* and granted the rent to *Sir Robert Heath*, but that long before the ſeiſin of *Bing*, *&c.* one *Leigh* was ſeiſed thereof in fee, who deviſed it to *Blunt* for a term of years, which term, by ſeveral aſſignments, came to *Claxton*, who gave the plaintiff leave to put in his cattle, &c.; and upon a demurrer to this replication an exception was taken to it, for that the plaintiff did not ſhew how the ſeiſin and grant of *Bing* to *Sir Robert Heath* was avoided; for having confeſſed a ſeiſin in fee *prout*, *&c.* that ſhall be intended a fee in poſſeſſion, and notwithſtanding he had afterwards ſet forth a leaſe for years in *Leigh*, by whom it was deviſed to *Blunt*, *&c.* and ſo to *Claxton*, it may be intended that the grantor was only ſeiſed in fee of the reverſion, and therefore the plaintiff ought to have traverſed the *ſeiſin aliter vel alio modo:* * but three Judges ſeemed to incline that the replication was good, and that the plaintiff had well confeſſed, and avoided that ſeiſin in fee which was alledged by the defendant, for he had ſhewed a leaſe for years precedent to the defendant's title, and which was not chargeable with the rent; and his pleading that the grantor *Bing* was ſeiſed in fee muſt be only of a reverſion expectant upon that leaſe *(b)*; but if his confeſſion that *Bing* was ſeiſed in fee *prout*, *&c.* ſhall be intended a ſeiſin in fee in poſſeſſion, yet the replication is good in ſubſtance, becauſe the charge againſt the plaintiff is avoided by a former eſtate, and in ſuch caſe it is not neceſſary to take a traverſe; but after all it was held, that if it be a defect, it is but want of form, which is aided by the ſtatute 27. *Eliz.* c. 5. and that is this very caſe now in queſtion. * [320]

The want of a traverſe ſeldom makes a plea ill in ſubſtance, but a naughty traverſe often makes it ſo, becauſe the adverſary is tied up to that which is material in itſelf, ſo that he cannot anſwer what is proper and material; and therefore in ejectment upon a leaſe *(c)* made by *Elizabeth James*, the defendant pleaded that before *Elizabeth James* had any thing to do, &c. *Martin Jones* was ſeiſed in fee, after whoſe death the land deſcended to his heir, and that *Elizabeth* entered and was ſeiſed by abatement; the plaintiff replied, and confeſſed the ſeiſin of *Martin Jones*, but ſaith that he deviſed it in fee to *Elizabeth James*, who entered; AB-

10. Mod. 253. 302. 11 Mod. 145. Fitzg. 31. Comyns, 302. 1. Ld. Ray. 42. 2. Ld. Ray. 1140. 2. Stra. 818. 859.

(a) Cro. Car. 323.

(b) But ſee Heley's Caſe, 6. Co. Dyer 171. 1. Leon, 77. *contra.*

(c) Bedel *v.* Lull, Yelv. 151. Cro. Jac. 221. 4. Bac. Abr. 68.

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SQUE HOC that *Elizabeth James* was seised by abatement; and upon a demurrer this was held to be an ill traverse, for the plaintiff had confessed the seisin of *Martin Jones*, and avoided it by the devise, and therefore ought not to have traversed the abatement; for having derived a good title by the devise to his lessor, it is an argument that he entered lawfully, and it was that alone which was issuable, and not the abatement; therefore it was ill to traverse that, because it must never be taken but where the thing traversed is issuable *(a)*.

Description of the *locus in quo* in replevin.

THEN it was said that the conusance was informal, because the avowant should have said that the *locus in quo*, *&c.* contains so many acres of ground, &c. he only says that it was parcel of a manor. Besides, he neither prays damages, nor *retorn. habend.*

* [321]

On a lease for two lives *et alterius eorum diutius viventis*, the entry of one lessee on the death of the other, makes him executor *de son tort* of the term, for the 29. *Car.* 2. c. 3. hath made it *assets*.

As to THE SECOND POINT it was said, that the statute of Frauds 29. *Car.* 2. c. 3. does not take away all occupancy, it only appoints who shall be a *special occupant*. Besides, here is a title within the statute, for a lease for lives is personal assets; so is a term in the hands of an EXECUTOR *de son tort*; and in this case the entering of one brother * after the death of the other made him an EXECUTOR *de son tort*; and it was never yet doubted, but that there may be such an executor of a term *(b)*.

Whereupon it was concluded that the bar was good, both as to the form and title set forth. But no judgment was then given *(c)*.

(*a*) Yelv. 200. 2. Mod. 55. 1. Burr. 320.

(*b*) Moor, 126. 1. Sid. 7.

(*c*) It appears by S. C. Carth. 165. that in the Hilary Term following JUDGMENT was given that *the bar* was not good.—FIRST, The Court held that the bar was ill for want of *a traverse* that the place WHERE was parcel of the manor at the time of the taking; for though the reversion of the *locus in quo* remained parcel of the manor after the demise for three lives, yet the place itself and the freehold were severed by the demise, and by consequence were not parcel of the manor *tempore quo*, *&c.*; therefore the plaintiff ought to have traversed that the *locus in quo* was parcel of the manor of *Arkey*, *tempore quo*, *&c.*—SECONDLY, That the seisin *in dominico* of the place WHERE was not traversable; for it is not expresly alledged in the conusance that *Sir Peter Warburton* was seised *in dominico* of the place WHERE, but only by consequence as it was parcel of the manor of *Arkey*, of which he was so seised; therefore, if he had traversed the seisin, it must have been of all the manor.—THIRDLY, That the default of a necessary traverse is *substance*, and not aided by a general demurrer.—FOURTHLY, On the point of *occupancy*, HOLT, *Chief Justice*, held that the 29. *Car.* 2. c. 3. does not take away all occupancy, but transfers it to executors; and that the lessor of the plaintiff was EXECUTOR *de son tort* by his entry on the lands, because the statute has made it *assets*.—S. C. Holt, 539. S. C. 3. Salk. 355. *accord.*

Boson

Boson *against* Sandford. Case 198.

Hilary Term, 1. & 2. Jac. 2. Roll 302.

THE PLAINTIFF declared, that the defendant and seven other persons were proprietors of a vessel, in which they used to carry goods for a reasonable hire from port to port; that he had loaded the said vessel with boards, which were agreed to be safely transported from *London* to *Topsham*; and that the defendant by neglect suffered him to be damnified, &c. Upon not guilty pleaded a special verdict was found, the substance whereof was as follows:

Where there are several proprietors of a vessel, and goods are damnified by carriage, the action must be brought against ALL the *proprietors*; and if it be brought against *one* proprietor only, he need not plead the jointure in *abatement*, but may take advantage of it by *evidence* on the *general issue*. *Sed quære*.

The plaintiff loaded the ship with boards, of which ship the defendant and seven other persons were proprietors; that the said ship usually carried goods for hire; that the plaintiff delivered the goods to *Daniel Hull*, who was *master* of the vessel, and that they were loaded therein, but that none of the proprietors were present; that there was no actual contract between the plaintiff and the proprietors, or any negligence in them, but the boards were damnified by the neglect of the said master, &c.

The questions upon this special verdict were two:

S. C. 1. Show. 29. 101. S. C. 2. Show. 478. S. C. Salk. 440. S. C. 3. Salk. 203. 258. S.C. Comb. 116. S. C. Carth. 58. S. C. Skin. 278. S. C. 1. Trem. 499. S. C. Molloy, 312. 1. Roll Abr. 2. Hob. 18.

FIRST, Whether this action would lie against the defendant alone, as one of the proprietors; or whether it must be brought against them all?

SECONDLY, If the action ought to be brought against them all, then *not guilty* was not a proper plea, because the defendant ought to have pleaded in abatement that the rest of the owners *super se susceperunt simul cum* the defendant, ABSQUE HOC *quod* HE *super se suscepit tantum*.

IT WAS ARGUED *for the plaintiff*, that the action may be well brought against any single person of the proprietors, because it is grounded upon *a tort* as well as upon *a contract*, which, in this case, is only an inducement to the action, and therefore the plaintiff has liberty to bring it either the one way or the other, for it is both joint and several. * So it is in trover, where a man declares that he was possessed of such goods, that the defendant found them and promised to deliver them, but converted them to his own use; *the contract* is but inducement, for the cause of action arises upon the conversion. This is a remedy given by the construction of the law, and if so, it must be certain and effectual to all intents; and therefore it has been ruled *(a)* in an action brought against a *common carrier* upon the *assumpsit* in law, and likewise upon *the tort*, that the declaration was ill; and though the

* [322]

1. Vent. 190. 238. 2. Vent. 75. 5. Mod. 92. 2. Lev. 69. 1. Salk. 282. Allen, 93. 1. Vern. 297. 465. 2. Vern. 643. 8. Mod. 166. 177. 295. 322. 9. Mod. 89. 10. Mod. 164. 11. Mod. 181. 12. Mod. 101. 446. 1. Ld. Ray. 127. 1. Stra. 128. 420. 503. 553. 2. Stra. 890. 910. 1045. 1. Wils. 281. 4. Burr. 2298. 2. Bl. Rep. 948. Cowp. 636. 2. Term Rep. 282. 4. Term Rep. 581.

(*a*) Mathews *v.* Hopkins, 1. Sid. 244.; Salk. 10. 5. Mod. 90. Ld. Ray. 58. see also Bage *v.* Brumwell, 3. Lev. 99. 4. Bac. Abr. 12. and 1. Lev. 101. Skin. 66. pl. 12.

plaintiff

Boson *against* Sandford.

plaintiff had a verdict, yet the judgment was arrested, because he had declared both ways. • Agreeable to this was that judgment which was given upon the statute of 2. *Edw.* 3. c. 13. for not setting out of tithes, in an action of debt brought against two *tenants in common*; it happened that one of them set out the tithes and the other carried them away, and because the action was brought against both it was held to be ill (*a*), for it lies only against him who did the wrong.

Comyns, 22. 272. 12. Mod. 301. 547. Ld. Ray. 312. 737. 871. Stra. 420.

SECONDLY, If the action ought to be brought against all, then the defendant should have taken advantage of it by pleading, and to have shewed who were the proprietors with himself; for it is impossible for the plaintiff to know who they are; and for this reason the plea is not good.

E CONTRA. The plaintiff ought to have brought his action either against the master alone or all the proprietors: it is true, if this had been only an action of a simple *trespass*, he might have brought it against all or one; but this sounds not only in a wrong, but it is in breach of a covenant or duty, and so ought to be commenced against all of them, as common carriers. Now the great reason why all are liable to an action is, because they all have a reward for the hire of the vessel (*b*); and it seems very unreasonable that one should bear the burthen, and the rest run away with the profit (*c*). The principal case in *Hutton* (*d*) is an authority directly to this purpose, though it was otherwise quoted by the plaintiff's Counsel; it was debt upon the statute of 2. *Edw.* 6. c. 13. brought against one lessee for not setting out of tithes, and it appeared upon the evidence that two were jointly possessed of the term, and for that reason it was held that the action would not lie against one alone.

SECONDLY, The defendant ought not to have pleaded in abatement that the rest of the proprietors *super se susceperunt simul cum* the defendant, &c. because such a plea would not have been good

(*a*) Sir John Gerrard's Case, cited in the case of Cole *v.* Wilks, Hutt. 121, 122.

(*b*) But by 7. *Geo.* 2. c. 15. "The "owner or owners shall not be subject "or liable to answer for, or make good any loss or damage by reason of any "embezzlement, secreting, or making "away with (by the master or mariners, "or any of them) of any gold, silver, "diamonds, jewels, precious stones, or other goods or merchandize shipped on board, or for any act, matter, or "thing, damage, or forfeiture, done, oc-"casioned, or incurred by the said mas-"ter or mariners, or any of them, "without the privity or knowledge of "such owner or owners, further than "the value of the ship with all her ap-"purtenances, and the full amount of "the freight due, or to grow due, for "and during the voyage wherein such "embezzlement, secreting, or making "away with, or other malversation of "the master or mariners shall be com-"mitted, &c. &c."—And see the case of Sutton *v.* Mitchel, 1. Term Rep. 18. and Hall *v.* Grant, cited in the case of Yates *v.* Hall, 1. Term Rep. 73.

(*c*) See Rich *v.* Coe, Cowp. 636. that although the master of a vessel be also the lessee of it for a term of years, yet the owners are still liable for necessaries furnished the ship by order of the master, though without their knowledge or without their being known to the person who supplied them.

(*d*) Cole *v.* Wilks, Hutton, 121.

here;

here; for he ſhall never be compelled to plead in abatement, either in * debt or contract, but in one ſingle caſe (a); and that is, where two are bound jointly, and one is ſued, he may plead in abatement, but cannot ſay *non eſt factum*, for the bond is his deed, ſince each of them have ſealed it.

BOSON *againſt* SANDFORD. Stra. 1146.

AFTERWARDS, in *Hilary Term*, the defendant had judgment, that the action ought to be brought againſt all the part-owners, becauſe they have all an equal benefit, and the ground of the action is upon a truſt repoſed in all, and every truſt ſuppoſes a contract; and in all caſes grounded upon contracts, the parties who are privies muſt be joined in the action (b). The maſter of the ſhip is no more than a ſervant to the owners; he has no property either general or ſpecial, but the power he has is given by the civil law. There are many caſes where the act of the ſervant ſhall charge the maſter; as for inſtance, *King Edward the Sixth* ſold a quantity of lead to *Renagre*, and appointed the *Lord North*, who was then chancellor of his court of augmentations, to take bond for payment of the money (c). *Lord North* appointed one *Benger*, who was his clerk, to take the bond, which was done, who delivered it to the lord, and he delivered it back again to his clerk, in order to ſend it to the clerk of the court of augmentations. *Benger* ſuppreſſed this bond, and it was the opinion of all the Judges of *England*, that *Lord North* was chargeable to the king, becauſe the poſſeſſion of the bond by his ſervant and by his order was his own poſſeſſion (d). So where an officer of the cuſtoms made a deputy, who concealed the duties, and the maſter, being ignorant of the concealment, certified the cuſtoms of that part of the revenue into THE EXCHEQUER upon oath, he was adjudged to be anſwerable for this concealment of his ſervant (e). So where the leſſor was bound that the leſſee ſhould quietly enjoy, and it was found that his ſervant by his command, he being preſent, entered, this was held to be a breach of the condition, for the maſter was the principal treſpaſſer (f). Therefore though the neglect in this caſe was in the ſervant, the action may be brought againſt all the owners, for it is grounded *quaſi ex contractû*, though there was no actual agreement between the plaintiff and them. And as to this purpoſe, it is like the caſe where a ſheriff levies goods upon an execution which are reſcued out of the hands of his bailiffs (g); this appearing upon the return, an action * of debt will lie againſt him, though there was no actual contract between the plaintiff and him; for he having taken the goods in execution, there is *quaſi* a contract in law to anſwer them to the plaintiff.

10. Mod. 110. 386. 11. Mod. 71. 87. 131. 12. Mod. 434. 488 564. 1. Vern. 95. 136. 208. 1. Ld. Ray. 225. 264. 739. 2. Ld. Ray. 1117. 1. Stra. 480. 505. 653. 2. Stra. 1083.

Molloy, 203. 209. 234.

* [324]

See Rich *v.* Coe, Cowp. 639. Hoare *v.* Davies, Dougl. 371.

(a) 5. Co. 119.; ſee alſo Cro. Eliz. 554. 1. Saund. 291. Moor, 466. 1. Mod. 102.

(b) Palm. 523.; ſee Molloy de Jure Maritimo, 201. 209.

* (c) Dyer 161.

(d)

(e) Dyer, 238. 2. Vern. 643. 3. Bac. Abr. 545. 561.

(f) 4. Leon. 123.

(g) 2. Saund. 345. Hob. 206. Hutt. 121. 1. Mod. 198.

As

Moor, 355. Cro. Eliz. 257. 4. Bac. Abr. 54. 84. 2. Stra. 1022. 10. Mod. 167. 299. 12. Mod. 97. 123. 376. Comyns, 139.

As to THE SECOND POINT, it was ruled, that *not guilty* was a good plea to any mis-feasance whatsoever, and that a plea in abatement, *viz.* that the rest of the owners *super se susceperunt simul cum defendente*, ABSQUE HOC *quòd defendens super se suscepit tantùm* had been no more than the *general issue*; but he has not pleaded thus (*a*).

DOLBEN, *Justice*, agreed that the action ought to be brought against all the proprietors, it being upon a promise created by law; but he was of opinion that this matter might have been pleaded in abatement (*b*).

(*a*) See the case of Deering *v.* More, Cro. Car. 554.

(*b*) But see the case of Abbot *v.* Smith, 2. Bl. Rep. 695. 947. where the authority of this case, as to the point of pleading, is impeached; and it is determined, that if an action be brought against one partner only, no advantage can be taken of the omission but by plea in abatement. See also the Year Book 35. Hen. 6. pl. 38. 9. Edw. 4. pl. 24. Whelpdale's Case, 5. Co. 119. Stead *v.* Mohun, Cro. Jac. 152. Chappel *v.* Vaughan, 1. Saund. 291. Ascue *v.* Hollingsworth, Cro. Eliz. 494. Sayer *v.* Chater, 1. Lutw. 691. Leslie *v.* Champante, 2. Stra. 820. 4. Bac. Abr. 47. Carth. 261. Moffat *v.* Farquharson, 2. Brown's Cases in Chan. 338.

Case 199.

Gold *against* Strode.

A judgment obtained in the king's bench makes *bona notabilia* in the county where the Court sit. S.C. Carth. 148. 7. Mod. 15. Salk. 40. Lutw. 401. 2. Show. 437. 2. Bac. Abr. 246. 401. 6. Mod. 136. 8. Mod. 244. 11. Mod. 223. 12. Mod. 537, 617. Comyns, 17. 2. Barnes, 142. Ld. Ray. 856. 1. Stra. 412. 2. Stra. 716. 781. 847. 1. Peer Wms. 766. 3. Peer Wms. 349. 351. 370.

AN ACTION was brought in *Somersetshire*, and the plaintiff recovered, and had judgment, and died intestate. *Gold*, the now plaintiff, took out letters of administration to the said intestate in the court of the Bishop of *Bath and Wells*, and afterwards brought a *scire facias* upon that judgment against the defendant to shew cause *quare executionem habere non debeat.* He had judgment upon this *scire facias*, and the defendant was taken in execution and escaped. An action of debt was brought by the said *Gold* against this defendant *Strode*, who was then sheriff, for the escape, and the plaintiff had a verdict.

It was moved in arrest of judgment, and for cause shewn, that if the administration was void, then all the dependencies upon it are void also, and so the plaintiff can have no title to this action. Now the administration is void, because the entering upon record of the first judgment recovered by the intestate in the county of *Middlesex*, where the records are kept, made him have *bona notabilia* in several counties; and then by the law, administration ought not to be committed to the plaintiff in an inferior diocese, but in the prerogative court (*a*).

(*a*) Salk. 40. 679. 2. Ld. Ray. 854. 8. Mod. 134. 2. Bac. Abr. 401.; and see the 4. *Ann.* c. 16. s. 26. respecting the granting probates and administrations to the widows and orphans of persons dying intestate, to monies or wages due for work done in the king's yards or docks.

CURIA.

*Curia. The sheriff shall not take advantage of this, since the judgment was given upon the *scire facias*; and the *capias ad satisfaciendum* issuing out against the then defendant, directed to the sheriff, made him an officer of this court, and the judgment shall not be questioned by him; for admitting it to be a recovery without a title, yet he shall take no advantage of it till the judgment is reversed. It is not *a void* but an *erroneous* judgment, and when a person is in execution upon such a judgment, and escapes, and then an action is brought against the gaoler or sheriff, and judgment and execution thereon, though the first judgment upon which the party was in execution should be afterwards reversed, yet the judgment against the gaoler, being upon a collateral thing executed, shall still remain in force (*a*). The *capias ad satisfaciendum* was a sufficient authority to the sheriff to take the *body, though grounded upon an erroneous judgment (*b*), and that execution shall be good till avoided by error, and no false imprisonment will lie against the gaoler or sheriff upon such an arrest.

Gold *against* Strode.

Comyns, 135. Fitzg. 80. 11. Mod. 50. 12. Mod. 31. 227. 634. 1. Ld. Ray. 309. 424. 2. Ld. Ray. 927. 1028. 1. Peer Wms. 688. 12. Mod. 396. 2. Ld. Ray. 1530. 1. Stra. 509. 2. Stra. 820. 1184

(*a*) Dalton Sheriff, 563. 8. Co. 141. 164. Moor, 274. Cro. Jac. 3. 1. 3. Bac. Abr. 241. Roll. Abr. 809. Godb. 403. 2. Leon. 84. Gilbert's Execution, 81, 82.

(*b*) 21. *Edw.* 4. pl. 23. Cro. Eliz.

MICHAELMAS TERM,

The Second of William and Mary,

IN

The Common Pleas.

Sir Henry Pollexfen, *Knt. Chief Justice.*

Sir Thomas Rokeby, *Knt.*
Sir John Powel, *Knt,*
Sir Peyton Ventris, *Knt.*
} *Justices.*

Sir George Treby, *Knt. Attorney General.*
Sir John Somers, *Knt. Solicitor General.*

Coghil *against* Freelove. Case 200.

An action lies in the *detinet* against an *administrator* for rent incurred after an assignment of the term; for the *privity of contract* is not determined by the death of the intestate.

DEBT FOR RENT was brought against the defendant, as administratrix of *Thomas Freelove* her late husband, deceased; in which action the plaintiff declared, that on the 1st of *May*, 21. *Car.* 2. he did by indenture demise to the said *Thomas Freelove* one messuage and certain lands in *Bushey* in *Hertfordshire*, HABENDUM from *Lady-day* then last past for and during the term of twenty-one years, under a yearly rent; that by virtue thereof he entered and was possessed; that on the 7th of *March* 1685 the said *Thomas Freelove* died intestate; that the next day administration of his goods and chattels was granted to the defendant; and that seventy-eight pounds was in arrear for rent due at such a time, for which this action was now brought in the *detinet*.

S. C. 2. Vent. 209. Dyer, 4. 3. Co. 23. Cro Eliz. 555. 715. Cro. Jac. 685. Poph. 120. Moor, 600.

The defendant confessed the lease *prout*, &c. and the death of the intestate, and that the administration was granted to her, but says, that before the rent was due, she, by articles made between her of the one part, and *Samuel Freelove* of the other part, did

Latch. 260. 1. Sid. 266. 1. Lev. 127. Prec. Ch. 156. 2. Mod. 175. 8. Mod. 72. 10. Mod. 12. 255. 11. Mod. 169. 12. Mod. 7. 23. 291. 371. 2. Com. Dig. "Dett." (E.) 2. Bac. Abr. 441. 1. Ld. Ray. 554. 3. Peer. Wm. 264. Dougl. 462. notis. 765. 3. Term Rep. 393. 4. Term Rep. 94.

assign

COGHIL *against* FREELOVE.

affign the faid indenture, and all her right, title, and intereft thereunto, and which fhe had in the premifes, unto the faid * *Samuel Freelove*, who entered and was poffeffed; that the plaintiff had notice of this affignment before he brought this action, but nothing was faid of his acceptance.

To this plea the plaintiff demurred, and the defendant joined in demurrer.

And judgment was given, by the opinion of THE WHOLE COURT, for the plaintiff, againft the authorities following. It is true, in the cafe of *Overton v. Sybal (a)*, it was refolved, that if an executor of leffee for years affign his intereft, debt for rent will not lie againft him after fuch affignment; the reafon there given was, becaufe the perfonal privity of the contract is determined by the death of the leffee as to the debt itfelf; and for the fame reafon the executor fhall not be liable to rent after the death of the leffee, if fuch leffee make an affignment of his term in his life-time. LORD COKE mentioning this cafe, in his *Third Report (b)*, affirms, that it was refolved by POPHAM, *Chief Juftice*, and the whole Court, that if an executor of a leffee for years affign his intereft, debt will not lie againft him for rent due after fuch an affignment; but POPHAM himfelf, in reporting that very cafe *(c)*, tells us he was of another opinion; which was, that fo long as the covenant in the leafe has the nature and effence of a contract, it fhall bind the executor of the leffee, who as well to that, as to many other purpofes, reprefents the perfon of the teftator, and is privy to his contracts. It is true, LORD POPHAM held in that cafe, that the action did not lie; but becaufe it was brought by the fucceffor of a prebendary, upon a leafe made by him in his life-time, who is a fingle corporation, the perfonal contract was determined by his death. But the fame cafe reported by others, is faid not to be adjudged, for the Court was divided in opinion *(d)*. The cafe of *Marwood v. Turpin (e)* is the fame, but there the defendant pleaded the acceptance of the rent after the affignment, which was not done here. Now if both thofe cafes fhould be admitted to be law, and parallel with this, yet the later refolutions have been quite contrary *(f)*; for it is now held, and with great reafon, that the *privity of contract* of the teftator is not determined by his death, but that his executor fhall be charged with all his contracts fo long as he has affets, and therefore fuch executor fhall not difcharge himfelf by making of

(*a*) Cro. Eliz. 555.
(*b*) 3. Co. 24.
(*c*) Poph. 120.
(*d*) In Latch. 262. 1. Show. 341. and Moor, 251. it is faid, that no judgment was given in this cafe; and in 1. Sid. 266. it feems to be denied to be law, at leaft as reported in Walker's Cafe, 3. Co. 24.; fee alfo Poph. 120, 121. Vent. 210. 2. Bac. Abr. 19. *in notis*. 1. Bl. Rep. 441.
(*e*) Cro. Eliz. 715. S. C. Moor, 600. S. C. 2. And. 133.
(*f*) 1. Sid. 240. 266. Allen, 34. 42. Palm. 118. Latch. 260. Noy, 97. Cro Jac. 334. Moor, 392. 1. Saund. 238. Wilf. 165. 3. Term Rep. 394.

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an aſſignment, but ſhall ſtill be liable for what * rent ſhall incur after he has aſſigned his intereſt; nay, if the teſtator himſelf had aſſigned the term in his life-time, yet his executor ſhall be charged in the *detinet*, ſo long as he has aſſets (*a*). COGHILL *against* FREELOVE.

(*a*) 4. Mod. 71. 2. Bac. Abr. 19. *notis.* Mills *v.* Auriol, 1. Bl. Rep. 433. Wadham *v.* Marlow, 1. Bl. Rep. 437.

Newton *against* Trigg. Case 201.

Michaelmas Term, 1. Jac. 2. Roll 226.

TRESPASS for breaking and entering of his cloſe, treading down of his graſs, &c. and taking away of his goods. * Upon not guilty pleaded, a ſpecial verdict was found, The ſtatutes of bankrupts do not extend to innkeepers.

That the plaintiff was AN INNKEEPER, and a freeman of the city of *London*; that he bought oats, hay, &c. which he ſold in his inn, by which he got his living; that he, with others, built a ſhip, and he had a ſhare therein; and a ſtock of fifty pounds to trade withal; that he was indebted to ſeveral perſons; that he departed from his houſe, and abſconded from his creditors; that thereupon a commiſſion of bankruptcy was taken out againſt him, at the petition of the creditors; that the plaintiff was indebted to *Trigg*; that the commiſſioners found him to be a bankrupt; and by indenture bearing date the 25th day of *June*, made a bargain and ſale of the goods to *Trigg*, who did take and carry them away, &c.

S. C. 1. Show. 96. 268. S. C. 1. Lev. 309. S. C. Carth. 149. S. C. Comb. 181. S. C. Salk. 109. Cro. Car. 549. 1. Vent. 270. Skin. 292. 1. Salk. 110 2. Mod. 48. 8. Mod. 46. 12. Mod. 159. 307. 344. 420. 591. Ld. Ray. 287. 852. 1. Stra. 513. 2. Stra. 809. 2. Peer Wms. 308. 3. Peer Wms. 298. 1. Com. Dig. 521. 2. Wilſ. 170. 382. 4. Burr. 2064. 2148. 1. Atk. 141. 2. Bl. Com. 476. 1. Cooke's B. L. 46

The queſtion was, Whether upon the whole matter the plaintiff was a bankrupt or not?

THOMPSON, *Serjeant*, argued, that he was not within any of the ſtatutes of bankruptcy; for AN INNKEEPER is under many obligations and circumſtances different from all other tradeſmen; he is to take care of the goods of travellers, and if he ſet an unreaſonable price upon his goods, it is an offence which the juſtices of peace and ſtewards in their leets have power to hear and determine.—SECONDLY, He does not buy and ſell by way of contract; for moſt of his gains ariſe by the entertaining and lodging of his gueſts, by the attendance of his ſervants, by the furniture of his rooms, and not by uttering of commodities, as in other trades. And therefore, by the opinion of three Judges in the caſe of *Criſp v. Prat (a)*, it was held, that AN INNHOLDER does not get his living by buying and ſelling; for though he buys proviſion, he does not ſell it by way of contract, but utters it at what gain he thinks reaſonable, which his gueſts may refuſe to give; and * BERKLEY, *Juſtice*, in the arguing of that caſe agreed, that he who gets his living by buying only, and not both by buying and ſelling, is not within the ſtatutes; but the jury having found that he got a livelihood by both, and by uſing the trade of AN INNHOLDER, *[328]

(*a*) Cro. Car. 549.

NEWTON *against* TRIGG.

therefore he was a bankrupt: but the other three Judges were of a contrary opinion, because AN INNKEEPER cannot properly be said to sell his goods. As to his having a share in a ship, it is no more than a stock to trade, which may go to an infant, or to an executor after his decease, and if either of these persons should trade with it, they cannot be made bankrupts, because it is *in autre droit (a)*.

E CONTRA it was argued, That he who keeps AN INN is a tradesman, and may be properly said to get his living by buying and selling. The goods of a traveller are not distrainable for the rent of an innkeeper; the reason is, because he is more immediately concerned as a tradesman for the benefit of commerce. It was the opinion of my *Lord Rolls (b)*, that an innkeeper was a tradesman, therefore any man might build a new inn, for it was no franchise, but a particular trade, to keep an inn. And as a tradesman he sells his goods to his guests by way of contract, for he is not bound to provide hay and oats for the horses of his guests without being paid in hand as soon as the horses come into the stable, for the law does not oblige him to trust for the payment (c). The case of *Crisp v. Prat*, as reported by CROKE, *Justice*, seems to be against this opinion, but it is misreported; for JONES, *Justice*, who mentions the same case, says, that it being found that the innkeeper got his living by buying and selling, it was the opinion of two Judges that he was within the statute; but the other two Judges, as to this point, were of a contrary opinion, for they held that *an innkeeper* could be no more a bankrupt than a *farmer*, who often buys and sells cattle and other goods *(d)*. Though a man is of a particular trade, yet if it do not appear that he got his livelihood by buying and selling, it is not actionable to call such a person bankrupt *(e)*. Now certainly if the plaintiff had declared that he was an innkeeper, and got his living after that manner, and that the defendant, to scandalize him, said "he "was a bankrupt," the action would lie, as well as for a dyer, farmer, carpenter, or such like trades of manual occupation. * Most of the innkeepers are farmers, and if it had been so found in this case, it would not have been denied but that he had been within the statute of bankrupts.

1. Mod. 215. Ld. Ray. 610. 741.

* [329]

Afterwards in *Trinity Term the third of William and Mary* judgment was given for the plaintiff: for, taking the whole matter as found by this verdict, it is not sufficient to make him a bankrupt. That he had a ship which he let to freight, this was not much insisted on at the bar to make him a bankrupt, for it is no more than for a man to have a share in a barge, hackney-coach, or waggon, all which are let for hire. Besides, in this case it is

(a) See the case *Ex parte Nutt*, 1. Atkins, 10[illegible], that the executor of a trader who only disposes of his testator's stock, or buys materials to fine the wine of the testator, is not a trader within the statutes of bankrupts.

(b) 2. Roll. Abr. 84.

(c) The Year Book 39. *Hen.* 6. pl. 18. and 19.

(d) Jones, 437. March, 34. See Salk. 110. Cro. Car. 31. Mayo v. Archer, Stra. 513.

(e) Stiles, 420. 1. Sid. 299.

found

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found that the plaintiff was but a partner with another. And as to the fifty pounds which he had in this trade, that is not sufficient to make him a bankrupt, for he must be actually a trader at the time that the debt was contracted, which is not found; so it must be to make the word "bankrupt" actionable, for it must be found that he was a trader at the time of the words spoken *(a)*. All the question of difficulty is, that the plaintiff was *an innkeeper*, and that he bought necessaries, and uttered them in his house; but this will not make him a bankrupt; because INNS are of necessity, and under the inspection of the public, and he cannot refuse to lodge travelling persons; and it is chiefly upon this account that he has several privileges which other traders have not, as to detain a horse till he is paid for keeping of it, &c. *(b)*. They are under the power of the justices of the peace, in the places where they are situated; for if AN INN be erected in an inconvenient place it is a nusance, and may be suppressed by indictment; it is the same with an ale-house; and therefore several statutes (*c*) which are made to prevent tippling, and which appoint at what price ale shall be sold, have been adjudged to extend to innkeepers. Where a man buys and sells under a restraint, and particular limitation, though it is for his livelihood, yet he is not within the statutes. INNKEEPERS do not deal upon contracts, as other traders do, for a Judge of assize may set a price upon their goods; and if they should set a price themselves, if it be unreasonable, they may be indicted for extortion. What they buy is to a particular intent, for it is to spend in their houses; and though they get their living by it, it is not *ad plurimum*, for the greatest part of their gains arises by lodgings, attendance, dressing of meats, and other necessaries for their guests. * Ever since the statute of 13. *Eliz.* c. 7. all the subsequent acts relating to bankrupts have been penned alike, except the 21. *Jac.* 1. c. 19. which is a little larger, and takes in *a scrivener* (*d*) and *an innkeeper*, but no law now in being extends to him. He is not taken notice of as a trader within any of the statutes of bankruptcy; he is only *communis hospitator*, a person or trader who buys and sells for hospitality; by receiving travellers he becomes chargeable to the public, to protect them and their goods (*e*). A *shoemaker*, *tanner*, and *baker*, are trades within the statutes; but the difference between those trades and *an innkeeper* is plain, because they use the manufacture, and thereby increase the value, as leather is made more useful, and of more value, by making of it into shoes (*f*). *A farmer* is not within the statute, and yet they all buy and sell, for it is ne- [330]

(*a*) Cro. Car. 282. 1. Sid. 411. 12. Mod. 159. 1. Show. 268. 1. Ld. Ray. 286. Dougl. 282. Cooke B. L. 17.

(*b*) 2. Roll. Rep. 345. Hutton, 100. 2. Roll. Abr. 64. Dalton, 28.

(*c*) The 1. *Jac.* 1. c. 9.; the 21. *Jac.* 1. c. 7.; and the 1. *Car.* 1. c. 14.

(*d*) See the case *Ex parte* Burchal, 1. Atk. 141.

(*e*) Cayle's Case, 8. Co.

(*f*) Ante, 155. Cro. Car. 31. Hutton, 46. Cro. Eliz. 268. Skin. 292. Cro. Jac. 584. 1. Bac. Abr. 249. 4. Burr 2042. 2. Espinasse Dig. 299.

NEWTON *against* TRIGG.

cessary to their occupation (*a*). This point was settled in the case of *Crisp v. Prat*; but the occasion of the doubt afterwards was by the publishing of *Justice Jones's Reports*, who doubted upon the particular finding of the jury, and so the Court came to be divided. There is no material difference between an *innkeeper* and the master of *a boarding-school*, who buys and dresses provisions for young scholars, and obtains credit by his way of living (*b*), but it was never yet thought that he was within any of those statutes (*c*).

(*a*) The 5. *Geo.* 2. c. 30. declares that farmers, graziers, and drovers, are not objects of the bankrupt laws; and it has been decided, that if a person buy cattle at a fair, and keep them three or four days on his land, and then drive them to another fair and sell them, he is *a drover* within the statute, Milles *v.* Hughes, Bull. N. P. 39. But although *a farmer*, as such, is not within the statutes, yet if he buy great quantities of such things as are the produce of his farm, and sell them again, this will make him a trader within the statutes. See Mayo *v.* Archer, 1. Stra. 513.; Bartholomew *v.* Sherwood, 1. Term Rep. 573.; Port *v.* Turton, 2. Wils. 169. So if he take the soil of the waste and make bricks of it, *Ex parte* Harrison, 1. Brown C. C. 173.; and *à fortiori* if he rent a brick ground only, independent of his farm, Parker *v.* Wells, 1. Brown C. C. 494. *notis.*

(*b*) Ld. Ray. 287. See Dally *v.* Smith, that a *butcher* may be a bankrupt, 4. Burr. 2048. See also *Ex parte* Meyot, 1. Atk. 196. 206.; Cooke's Bankrupt Laws, 74.; 4. Burr. 2064.; 3. Wils. 146.

(*c*) So also it has been held, that a *victualler* who sells liquors only in his own house, or out of it in small quantities, or by the pot or mug, and rather to oblige his customers than as a means of living, is not a trader within the bankrupt laws, Saunderson *v.* Rowles, 4. Burr. 2065.; but if either a *victualler* or an *innkeeper* deal in liquors as in a distinct business, however small the quantities sold may be, they may be bankrupts, Patman *v.* Vaughan, 1. Term Rep. 572.; Buscal *v.* Hogg, 3. Wils. 146.

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Case 202.

Rowsby *against* Manning.

Michaelmas Term, 4. Jac. 2. Roll 15.

In debt on an arbitration bond, conditioned, "so "as the award "be made on "such a day, "and ready to "be delivered "to the parties, "*or* to such of "them as desire "it;" a replication to "no "award made," shewing an award made before the day, is good on demurrer; for as it was made, it shall be intended ready for delivery; and therefore not necessary to be averred.— S. C. Carth. 158. S. C. 1. Show. 98. 222. 1. Roll. Abr. 245. 416. Cro. Jac. 577. 278. 1. Roll. Rep. 193. 1. Sid. 370. 1. Salk. 75. 2. Lev. 58. 1. Barnes, 41. 2. Barnes, 53. 140. 11. Mod. 170. 12. Mod. 120. 234. 317. Comyns, 114. 328. 2. Vern. 100. 109. 514. 705. 1. Ld. Ray. 115. 247. 533. 2. Ld. Ray. 989. 1039. 1. Com. Dig. 394. 1. Bac. Abr. 146. 151. [illegible] Kyd on Awards, 196. 5. Co. 103. More, 642.

DEBT ON A BOND for performance of an award, "*so as* it be "made by such a day, and ready to be delivered to the par- "ties, or to such of them as desire it." The defendant pleaded *nullum fecerunt arbitrium, &c.* The plaintiff replied, that after the submission, and before the day appointed in the condition, the arbitrators did make their award, by which they ordered the defendant to pay so much money to the plaintiff, and so assigned the breach for non-payment, &c. And a demurrer to this replication.

TREMAINE, *Serjeant*, said it was a conditional submission, *viz.* to perform an award, so as it be made by such a day, and ready to be delivered to the * parties, and the plaintiff has not shewed that it was ready to be delivered to the defendant, which he ought to have averred. If the condition be to perform an award between the parties, *ita quòd arbitrium præd. fiat et deliberetur utrique*

partium

Rowley against Manning.

partium præd. before such a day, it must be delivered to all the parties, and not to one, for each of them are in the danger and penalty of the bond.

THOMPSON, *Serjeant*, *è contra*, agreed it to be a conditional submission, but not such as goes to the substance of the award itself; for the conditional words are not to the award, but to the form of the delivering of it, and therefore it should come on the defendant's side to shew that it was not ready to be delivered.

CURIA. If an award be actually made, it is then ready to be delivered; but in this case it must be ready to be delivered to the parties, or to such of them who desire it, so it must be desired; and if then denied, the party may plead the matter specially. The submission was, *so that* the award be made *ad vel antea 5. Decemb.* ready to be delivered at a certain shop in *London*; the plaintiff shewed an award made at *York* ready to be delivered at the shop in *London*; this was adjudged to be a void publication and delivery, because a place was appointed where it should be delivered and published, *viz.* at the shop in *London*, where the parties were to expect it, and not elsewhere (*a*). So it would have been if *a day* had been appointed on which it ought to be delivered, and the day had been mistaken (*b*). But here is neither *day* or *place* appointed for the delivery, so that the defendant ought to have desired the award; and if it had not been ready to be delivered, he ought to have pleaded the matter specially (*c*). 2. Saund. 73.

(*a*) Bushfield *v.* Bushfield, Cro. Jac. 577. adjudged by DODDERIDGE and HOUGHTON, *Justices*, against MONTAGUE, *Chief Justice*; but the case was moved the ensuing Term, when the court was full, and CHAMBERLAIN, *Justice*, being of opinion with the Chief Justice, no judgment was given, S. C. 2. Roll. Rep. 194. But see Kyd on Awards, 195.

(*b*) Roberts *v.* Marriott, 2. Saund. 301. 1. Mod. 42.

(*c*) It is said that judgment was given for the plaintiff, S. C. 1. Show. 98. 242. for the reason given in the case of *Bradsey v. Clyston*, *Cro. Car.* 541. because, as it appears the award was in writing, it shall be intended ready to be delivered. S. C. Carth. 159.; and see Marks *v.* Marriot, 1. Ld. Ray. 114. 2. Ld. Ray. 989. *accord.*

HILARY TERM,

The Second of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*
Sir William Dolben, *Knt.*
Sir William Gregory, *Knt.* } *Justices.*
Sir Giles Eyres, *Knt.*
Sir George Treby, *Knt. Attorney General.*
Sir John Somers, *Knt. Solicitor General.*

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* Mr. Leigh's Case.

Case 203.

LEIGH brought a *mandamus* to be restored to the office of A PROCTOR of *Doctors Commons.*

A *mandamus* will not lie to admit or to restore a person to the office of A PROCTOR in *Doctors Commons.*

The return was, that the court was the supreme court of the *Archbishop of Canterbury*, who had the government thereof; that he appointed a judge of the said court, who had power to alter and displace officers; that the defendant was admitted and sworn *a proctor* of the court, and took an oath to obey the orders thereof; that part of the said oath was, "that no proctor should "do any thing in that court without the advice of *an advocate*;" that he had done business without such advice in a certain cause there depending; and that he refused to pay a tax of ten shillings imposed upon him by order of the court towards the charges of the house.

S. C. Holt, 435. S. C. 1. Show. 217. 251. 261. S. C. Carth. 169. S. C. Skin. 290. S. C. 3. Salk. 230. Ante, 265. 3 Lev. 309. 1. Vent. 143. 6. Mod. 18. Stiles, 457. Ray. 69. March. 177. 1. Sid. 31.

The questions upon this return were:

FIRST, Whether a *mandamus* will lie to restore a person to the office of a proctor?

1. Lev. 23. 2. Lev. 15. 8. Mod. 27. 267. 10. Mod. 262. 11. Mod. 67. 174. 214. 281. 12. Mod. 232. 609. Fitzg. 123. 194. Ld. Ray. 959. 989. 1004. 1206. 1244. 1267. 1379. 1405. 4. Com. Dig. "Mandamus" (B.). 3. Bac. Abr. 532. Dougl. 629. 3. Term Rep. 575.

Mr. Leigh's Case.

Secondly, Whether a sufficient cause was returned to displace *Mr. Leigh?*

As to the first it was argued, that a *mandamus* does lie, because it is a public office, and concerns the administration of justice; and the proctors being limited to a certain number, *viz.* twenty-eight, if many of them should be displaced, it would be a means to hinder justice. This court judicially takes notice of the ecclesiastical courts, by prohibiting them, by taking notice of their excommunications, or of any proceedings when they are
* [333] against the law of the land. * A proctor does the business in that court as an attorney in the court of king's bench, and notice is taken of his place as judicially as of any other officer; and as to this purpose those officers cannot be distinguished: if therefore a *mandamus* has been granted to restore an attorney (*a*), why not a proctor? The plaintiff has no remedy but by a *mandamus*, because *an assize* will not lie of this office. It is admitted that an action on the case may be brought, but then damages only are to be recovered, and not the office; and it would be very inconvenient to leave it to a jury to give such damages as the party may sustain for the loss of his livelihood. It is no objection to say, that there is a proper *visitor* in this case to whom to appeal, *viz.* to *the archbishop*; for they have not set out any such visitatorial power in the return; or if any, that he had power to restore him. But if such power had appeared upon the return, yet a proctor ought not to appeal to the archbishop or to the guardian of the spiritualties *sede vacante*, because it is in effect to appeal to themselves; for the dean of the arches, before whom the appeal must be brought, is an officer appointed by the archbishop himself, and has the same jurisdiction with him. Besides, the proctors there are not properly under any visitatorial power; they have a particular jurisdiction within themselves, and their courts have been held in several places, as at *Bow*, *Christchurch*, &c.

Rex *v.* Marquis of Stafford, 3. Term Rep. 646.

Then as to the causes of this removal it is returned,

First, For receiving and prosecuting of a cause without the advice of an advocate, contrary to a statute made by *Archbishop Abbot.*

Secondly, For refusing to pay ten shillings set upon him as a tax towards the charges of the house.

Now neither of these are sufficient causes to displace him.

As to the first cause, if that statute give them any such power it is void, because it deprives a man of his freehold, which cannot be done but by the law of the land. It is not said when this offence was committed, for it may be before a general pardon, and then it is discharged. But if it is an offence, that will not make a forfeiture without warning, and no such thing appears upon the return; for if he had notice publicly, he might have

(*a*) 1. Sid. 94. 152.

offered

Mr. Leigh's Case.

offered something in excuse of himself, as sickness, &c. which might have been allowed by the court (*a*). * It is as unreasonable a law to put the clients to unnecessary charges to advise with *an advocate* upon an ordinary libel, as it would be for *an attorney* of the king's bench to advise with counsel to draw a declaration on a bond. – SECONDLY, They do not shew by what authority they may levy a tax, neither do they set forth what tax was made in the whole: so that it might appear that ten shillings was a proportionable part for him to pay; neither does it appear when this tax was made, or that *Mr. Leigh* was a proctor when it was made.

E CONTRA. This is not an offence in matter of judgment, but it is a misdemeanor, and punishable. It is very like the case of fellows of colleges, who have proper *visitors*, and therefore the king's bench will not grant a *mandamus* in such cases (*b*). A proctor is an officer of a court different from the courts of law, and therefore the king's bench cannot take notice of his office judicially; they have no other way of punishing of a proctor but by displacing of him; and if this should be remedied by a *mandamus*, then those persons may offend without punishment (*c*). It is not like the case of an attorney (*d*), for he being an officer of the king's bench, the court judicially takes notice of him, but not of a proctor. It is more like the case of a steward of a court baron (*e*), which is of private jurisdiction, and for which a *mandamus* has been denied. It is like *Middleton's Case* (*f*), who was treasurer of the New River Water: it is true, a *mandamus* was granted to restore him to that office (*g*), but it was only *de bene esse* to bring the matter before the court, though that was a corporation settled by act of parliament. It is also like the cases of abbots, priors, and monks, for whom a *mandamus* was never granted, because they are ecclesiastical corporations, and have proper visitors, which is now by law devolved upon the arch- 12. Mod. 6[illegible].

(*a*) 11. Co. 99. a.

(*b*) Skin. 454. 4. Mod. 112. Carth. 92. 1. Sid. 71. Ray. 31. 68. 101. 1. Mod. 82. Fitzg. 123. 2. Ld. Ray. 1334. Stra. 557. 895. 2. Burr. 1044. Andr. 185.—But see Rex *v.* the Bishop of Lincoln, 2. Term Rep. 338. *notis*, that the Court will grant a *mandamus* to a *visitor* to hear an appeal and give some judgment.—See also the Scarborough Case, 2. Term Rep. 732.

(*c*) Carth. 169. 3. Lev. 309. Skin. 290.

(*d*) 1. Lev. 75. 1. Sid. 152.

(*e*) 2. Sid. 112. Ray. 12. 2. Lev. 18. Fitzg. 195. In the case of Rex *v.* Rennett also, a *mandamus* to the steward of a manor to admit a copyholder claiming by descent was refused, 2. Term Rep. 197.

(*f*) 1. Lev. 123. 1. Sid. 169. 1. Keb. 625.

(*g*) See also a case in Hilary Term 6. *Geo.* 2. cited in the case Rex *v.* the Mayor of London, 2. Term Rep. 177. where a *mandamus* was granted to restore to the office of *clerk* or *surveyor of the city works*, it being an office *for life*. So also a *mandamus* lies to restore to the office of *clerk of the Bridgehouse estates* in London, it being for an ancient office for life, &c. &c. unless it appear that there was good ground for his suspension, Rex *v.* Mayor of London, 2. Term Rep. 177. —See Rex *v.* Commissioners of Landillo, 2. Term Rep. 232.; Rex *v.* Jotham, 3. Term Rep. 575.; Rex *v.* Marquis of Stafford, 3. Term Rep. 646.

bishop,

Mr Leigh's Case. bishop. So also lay corporations have visitors, which are their founders and their heirs (*a*). It is an objection of no force to say that this appeal must be to the DEAN OF THE ARCHES, which is to appeal to the same person; because though it be true that *the dean* is constituted by *the archbishop*, yet when once he is invested with that office, he is in for his life, and *the archbishop* cannot afterwards come into that court, and execute the office of dean himself; so he is not the same person, neither hath he the same jurisdiction.

[335] * CURIA. A proctor is not an *office*, properly speaking; it is only an *employment* in that court, which acts by different laws and rules from the king's bench; they have an original jurisdiction over this matter, and a *mandamus* is in the nature of an appeal, which will not be granted where they have such a jurisdiction; but when they exceed it, and encroach upon the common law, then prohibitions are granted. It is for this reason that in cases of divorce, which are of a higher nature than this case is, no appeal can be to the king's bench, for it would be an endless business for persons to appeal *ab uno ad aliud examen*; and therefore credit must be given to the determinations of those courts who have such original jurisdiction. Officers are incident to all courts; and must partake of the nature of those several and respective courts in which they attend, and the judges, or those who have the supreme authority in such courts, are the proper persons to censure the behaviour of their own officers; and if they should be mistaken, the king's bench cannot relieve; for in all cases where such judges keep within their bounds, no other court can correct their errors in proceedings. Now for a churchwarden (*b*), a parish clerk (*c*), an attorney (*d*), or the like, all these are temporal officers, and are to be ordered by the temporal laws. But if any wrong be done in this case, the party must appeal.

1. Roll. Abr. 5 6.

So no *writ of restitution* was granted.

(*a*) See Rex *v.* St. Catherine's Hall, Cambridge, 4. Term Rep. 233. that in the case of a private eleemosynary foundation, if no special visitor be appointed by the founder, the right of visitation, in default of heirs, devolves to the king, to be exercised by the great seal.

(*b*) Carth 393. Salk. 166. 12. Mod. 116. Ld. Ray. 138. 3. Bac. Abr. 531.

(*c*) Stiles, 457. 2. Sid. 112. 1. Vent. 143. Comb. 105. 6. Mod. 253. 1. Stra. 59.; Rex *v.* Henchman, 3. Bac. Abr. 531.

(*d*) 1. Lev. 75. 1. Sid. 152.

Case 204. The King *against* the Warden of THE FLEET.

An inquisition of office, finding that the warden of the Fleet had permitted voluntary escapes, without finding what *estate* he had in the office, is not sufficient to entitle the king to the forfeiture.—S. C. Holt, 504. S. C. 3. Lev. 288. 39. *Hen.* 6. pl. 32. Salk. [illegible] 2. Bulst. 58. 3. Bac. Abr. 743, 744.

AN INQUISITION being found to seize the office of WARDEN OF THE FLEET into the king's hands, the court of chancery, assisted with three Judges, was moved that it might be quashed.

The

The exceptions taken were, *viz.* THE KING *against* THE WARDEN OF THE FLEET.

FIRST, It is found that the defendant was warden of the Fleet, but does not say what estate he had therein, whether for life, or years, or in fee, &c.

SECONDLY, The offences which are the causes of the forfeiture are laid to be committed in the Fleet, by suffering escapes, and by extortion, and it is not found where the Fleet is situate; so there being no *visne*, those offences cannot be traversed.

THIRDLY, They do not find the escape to be *sine licentiâ et contra voluntatem* of the warden, the debts being unpaid.

FOURTHLY, Admitting it to be a forfeiture, the office cannot go to the king, but it shall go to the next who has the inheritance.

* The opinion of THE COURT was, that there are two things which entitle the king to this office, neither of which were found by this inquisition. FIRST, An estate in the party offending. SECONDLY, A cause of forfeiture of that estate. Now here was no estate found in the warden, but only that the office was forfeited by suffering of escapes, &c. If this had been an office of inheritance, then it ought to be found that such a person was seised in fee, &c. (*a*), and so what estate soever he had in it ought to be expressly found. But as this is found, it is void; because it does not answer the end for which the finding of offices was provided, which is to entitle the king to the offender's estate. An indictment is but another sort of office; and here being no estate found, it is much like an indictment which finds no offence, therefore it must be quashed. It might have been objected, that no man can tell what estate the warden had in this place; and that not being known, no office could be found for the king. But this objection runs to the finding of all manner of offices in general, whose very nature is to find an estate, and to divest the subject thereof and vest it in the king. Besides, in this case one of the indentures by which the office was granted to the warden must be enrolled in the court of common pleas. This cannot be helped by a *melius inquirendum*, which never will support a defective inquisition (*b*); and this is such, because it does not appear that the defendant had any seisin or estate in the wardenship of the Fleet.

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10. Mod. 122. 359. 409. 12. Mod. 177. 438. 1. Ld. Ray. 201. 2. Ld. Ray. 1521.

(*a*) 9. Co. 95.
(*b*) 3. Cro. 895. 9. Co. 95. Keilw. 194.

Barker

Case 205.

Barker *against* Damer.

Hilary Term, 1. Will. & Mary, Roll 635, or 505.

If a person seised in fee of lands in *Ireland* make a lease for years of the same in *London*, and the lessee covenants to pay the rent to the lessor, his heirs and assigns, in *London*, the assignee of the reversion cannot maintain covenant in *London* for non-payment of rent, against the assignee of the lessee of this lease; for although it is an *express covenant*, yet the *privity of contract* being destroyed by the assignment; the party is only chargeable by reason of his possession, and their covenant on the *privity of estate* must be where the land lies.

S. C. Salk. 80. S. C. 1. Show. 191. S. C. Carth. 182. 6. Co. 46. Cro. Car. 183. Latch. 197. W. Jones, 43. Hob. 37. Cro. Jac. 142. 3. Lev. 233. 2. Saund. 238. 7. Co. 2. Dyer, 194. 2. Lev. 80. Cro. Eliz. 636. 1. Salk. 80. 3. Mod. 73. 322. 11. Mod. 169. 12. Mod. 23. 399. 408. 515. 1. Stra. 446. 614. 646. 2. Stra. 776. 847. Ld. Ray. 1059. 1455. 1504. 1. Bac. Abr. 34. 1. Wilf. 165. Dougl. 187. 765. 1. Term Rep. 395. 2. Term Rep. 238. 4. Term Rep. 504.

AN ACTION OF COVENANT was brought by *Sir William Barker* (who was defendant in a former action) against *Mr. Damer*, wherein he declared that *William Barker* his father was seised in fee of the land in question (being in *Ireland*), and made a lease thereof to one *Page*, for thirty-one years, under the yearly rent of two hundred pounds; in which lease *Page* did covenant for himself, his executors, administrators, and assigns, to pay the rent to *Mr. Barker*, his heirs and assigns; * that *William Barker* the father by lease and release conveyed the reversion to *Sir William Barker*, the now plaintiff; and that the term was vested in the defendant: and assigns the breach for non-payment of the rent. The defendant pleaded to the jurisdiction of this court, that the lands in the declaration mentioned lay in *Ireland*, where they have courts of record, &c. and so properly triable there. To this plea the plaintiff demurred; and the defendant joined in demurrer.

The single question was, Whether an assignee of the reversion can bring an action of covenant against the assignee of a lessee in any other place than where the land is?

Those who argued that he may, said, that this action being brought upon an express covenant, is not local but transitory (*a*), for *debitum et contractus sunt nullius loci*; and if it is a duty, it is so every where; therefore it has been adjudged, that upon a covenant brought in one county, the breach may be assigned in another.

TREMAINE, *Serjeant*, *on the other side*, admitted, that debt upon a lease for years upon the contract itself, and covenant between the same parties, are transitory actions, and may be brought any where; but when once that privity of contract is gone, as by assignment of the lessee or the death of the lessor, and there remains only a privity in law, there the action must be brought in the county where the land lies (*b*); the reason is, because the party is then chargeable in respect of the possession only (*c*). Therefore it was held (*d*), that where an assignee of a reversion of lands in *Somersetshire* brought an action of debt in *London*, upon a lease for years made there, reserving a rent payable at *London*, which was in arrear after the assignment, that the action was not well brought, for it ought to have been laid in *Somersetshire*, where the lands

(*a*) 2. Inst. 231. Noy, 142. Cro. Jac. 142. 1. Sid. 157. 2. Roll. Abr. 571. 1. And. 82.

(*b*) Latch. 197.

(*c*) Hob. 37.

(*d*) Bord *v.* Cudmore, Cro. Car. 183. Jones, 83. Dyer, 40.

were,

Barker against Damer.

were, because the privity of contract was lost by the assignment of the reversion; and therefore the party to whom that assignment was made, ought to maintain the action upon the privity in law, by reason of the interest which he had in the land itself; and that must be in the county where it lies (*a*).

* Curia. There is a difference between an action of debt for rent brought by an assignee, and an action of covenant; for the first is an action at the common law, which has fixed the rent to the reversion, and therefore such an action must be maintained upon the privity of estate, which is always local. But an assignee of a reversion could not bring an action of covenant at the common law, for it is given to him by a particular statute, *viz.* of 32. *Hen.* 8. c. 34.; but the statute did not transfer any privity of contract to the assignee, but the intent of it was to annex to the reversion such covenants only which concerned the land itself, as to repair the house and amend the fences, and not to annex or transfer any collateral covenants, as to pay a sum of money, for that is fixed by the common law to the reversion. It is true, at the common law an assignee of a reversion might have maintained an action of covenant for any thing agreed to be done upon the land itself: privity of contract is not thereby transferred so as to make the action transitory, but it must be brought upon the privity of estate; for if a man covenant to do any collateral thing not in the demise, and the word "assigns" is in the deed, yet they are not bound if they have no estate; so that it is not the naming of them, but by reason of the estate in the land they are made chargeable.

* [338]

1. Sid. 402. 3. Cro. 580. 1. Saund. 240. 32. *Hen.* 8. c. 34.

No judgment is entered upon the roll (*b*).

(*a*) See 1. Lev. 259. 2. Lev. 233. 1. Saund. 238. 1. Wilf. 165. Tidd's Practice, 11. Cowp. 176. 3. Term Rep. 387.

(*b*) It does not appear in the reports of this case, 1. Show. 192. that any judgment was given; but S. C. Carth. 182. says, the Court inclined against the plaintiff, for that they did not apprehend any difference as to this purpose between an action of *covenant* and *debt*. In the case of *Wey v Tully*, 6. *Mod.* 194. In debt for rent, upon a demise of lands in *Jamaica*, brought in *London* by the *lessor* against the *lessee*, Holt, *Chief Justice*, recognised the above case of *Parker v Damer* as good law, for it is grounded upon the *privity of estate*, which is local, and therefore to be brought where the land lies. S C. 2. Salk. 651. — See also the case of Webb v. Russell, 3. Term Rep. 373.

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